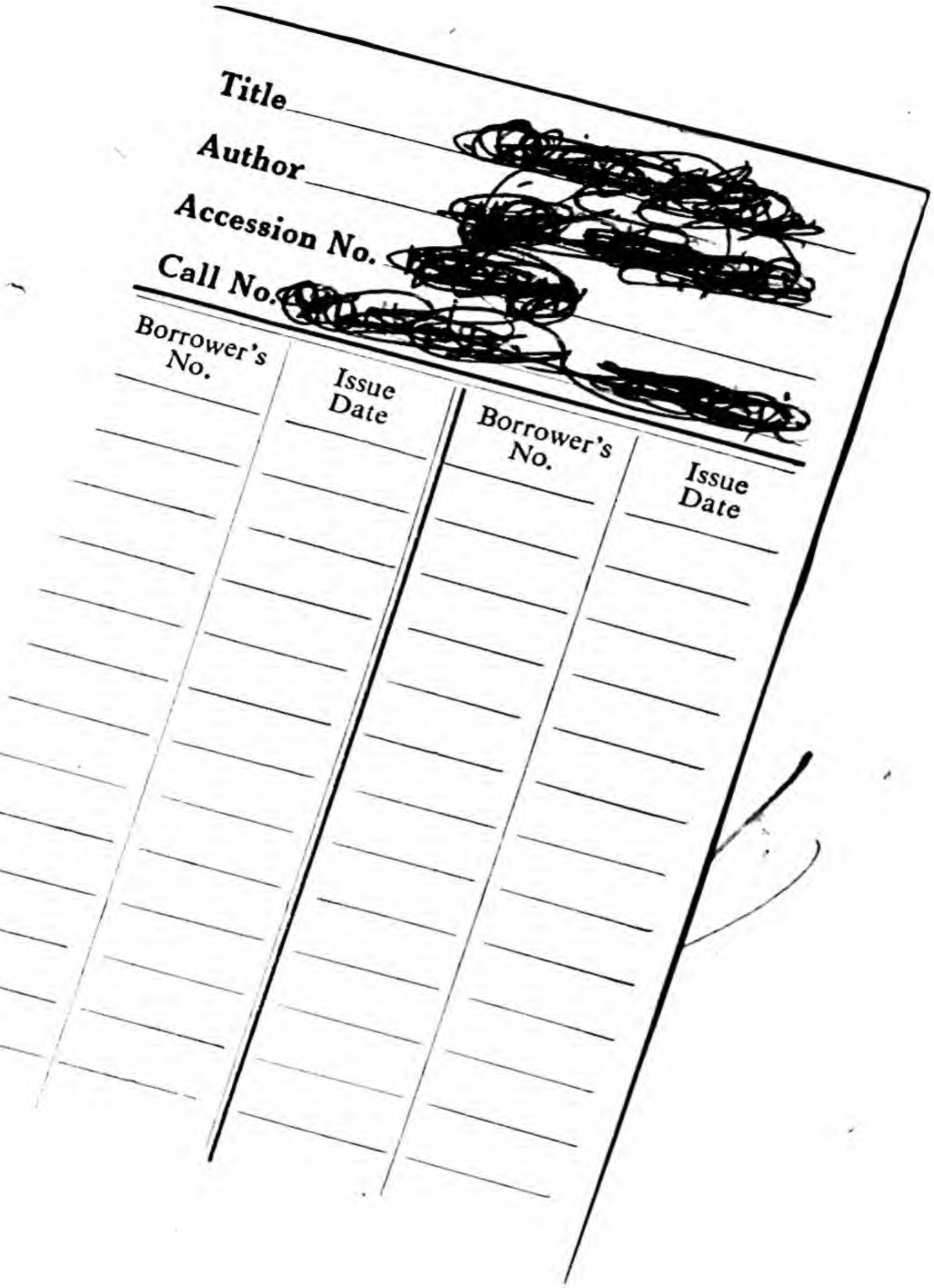
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Indian Appeals :

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY HERBERT COWELL, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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1890.

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***And others ex-officio under the New Appellate Jurisdiction Act of* 1887.**

A TABLE

OF THE

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IN THIS VOLUME.

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Title [redacted]

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CASES
IN
THE PRIVY COUNCIL
ON APPEAL FROM
The East Indies.

BUDRI NARAIN . . . . . PLAINTIFF; J. C.*
AND
MUSSUMMAT SHEO KOER . . . . . DEFENDANT. 1889
Nov. 15.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice—Civil Procedure Code, s. 549—*Powers of High Court—Enlargement of Time for giving Security.*

Where the High Court has ordered security for costs to be given by an Appellant, it has power under sect. 549 of the *Civil Procedure Code* to enlarge the prescribed time for so doing on application made either before or after such time has elapsed. If ultimately the security is not furnished, the Court may reject the appeal.

Haidri Bai v. *East Indian Railway Company* (Ind. L.R. 1 Allahab. 688) overruled.

APPEAL from an order of the High Court (June 2, 1885), made under *Civil Procedure Code*, s. 549.

The circumstances are stated in the judgment of their Lordships.

Branson, for the Appellant.

C. W. Arathoon, for the Respondent.

**Present* :—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

This is an appeal from a decree of the High Court of *Calcutta*, made on the 2nd of June, 1885.

On the 12th of February, 1885, an order was made by that Court, directing that the Appellant should within two months furnish security to the extent of Rs. 5000 in respect of the costs of the appeal before it, and of the original suit. It appears that on the 10th of April, two days before the expiration of the period of two months, the Appellant offered as security a bond by two parties of two sets of properties, and on the 13th of April the pleader of the Respondent asked that the matter might stand over, and that it should be referred to the Registrar to inquire whether the security was sufficient, that being the day after the expiration of the two months. The matter went to the Registrar. There was first an extension of time until the 20th of April, and on the 18th of April a further extension until the 27th. On the 28th of April the Registrar submitted a report in which he stated that each of the two sets of properties included in the security bond, which had been executed on the 24th of March, 1885, and registered on the 1st of April, was of sufficient value, but he submitted for the judgment of the High Court questions of law which had been raised before him with regard to the power of the parties executing the bond to deal with the properties. On the 2nd of June the High Court, on the matter coming before them, made a decree by which they said: "It is ordered, under the provisions of sect. 549 of the *Code of Civil Procedure*, that this appeal be and the same is hereby dismissed." Their reason for dismissing it appears in their judgment, in which they say: "We find that it has been decided by the *Allahabad* High Court in the case of *Haidri Bai* v. *East Indian Railway Company* (1) that where the High Court orders an Appellant to give security for costs, the Court may extend the time within which it orders the security to be furnished, if an application is made within that time, but if the security is not given within the time ordered by the Court, and no application is made within that time to extend the

(1) Ind. L. R. 1 Allah. 688.

time for giving security, the Court is bound, by sect. 549 of the *Civil Procedure Code*, to reject the appeal." It is contended before their Lordships that the effect of that section is that the security which was tendered on the 10th of April is the only security which can be looked at, and if, upon the inquiry which was afterwards made, it turns out to be insufficient, the Court has no power under the Act to extend the time for giving security so as to enable the Appellant to do what, when it appeared that there was this doubt about the right of the parties to pledge the property included in the bond, he was willing to do, namely, deposit the sum of Rs.5000. In the present case this observation arises, that, in fact, the Court did give an extension of time beyond the 12th of April, and, if the Appellant is right, the proceedings by which the matter was referred to the report of the Registrar on the 13th, on the application of the Respondent's pleader, would be altogether nugatory and idle. The Court, up to the time of the Registrar making his report, did give time for inquiry, and substantially did give an extension of time up to that period. The question is this, Is the Act so framed as to make it imperative upon the Court to reject the appeal if it turns out, upon the inquiry, that the security is insufficient? The words do not seem to be such as to require that conclusion. The section says: "That the Appellate Court may, at its discretion, either before the Respondent is called upon to appear and answer, or afterwards, on the application of the Respondent, demand from the Appellant security for the costs of the appeal, and if such security be not furnished within such time as the Court orders, the Court shall reject the appeal." Those words appear to be consistent with the Court having power to make fresh orders with regard to the time within which the security should be furnished, and not to fetter it in the way that is contended for by the learned counsel, that having once made an order and fixed a time they can make no alteration in it, no matter what circumstances might occur which would render it impossible for that order to be complied with. That would not be a reasonable construction of the Act. The other construction is a reasonable one, that the application to the Court, to enlarge the time for giving security may be made either before or after

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the expiration of the time within which the security has been ordered to be furnished, and the Court may thereupon enlarge the time according to any necessity which may arise where it is just and proper that they should do so. If ultimately the order is not complied with, and the security is not furnished, the appeal may be dismissed. That agrees with the view which their Lordships have taken of the section in a case in which judgment was delivered on the 3rd of April last of *Syed Rajab Ali* v. *Syed Amir Hossein and Others*.

In the present case it appears to their Lordships that the High Court were wrong in holding that they had no power to extend the time for giving the security, and that they were bound, by sect. 549, to reject the appeal. It was certainly a case in which they might properly have considered whether they should not allow the appeal to be heard. There was an application for review after the order of the 2nd of June was passed, and it then appeared that the party was ready to give the security by deposit of the Rs.5000. It is to be regretted that the Court did not allow that to be done, but adhered to its view of sect. 549, which appears to their Lordships to be erroneous.

With regard to what should be done in the present case, the decree of the High Court of the 2nd June, 1885, should be reversed, and an order similar to that which was made in the case of *Kuar Balwant Sing* v. *Kuar Doulut Sing* (1) should be made. That was: "That the Appellant may give security for the costs mentioned in the order of the 3rd of June, 1882"—in this case it will be the order of the 12th of February, 1885—"of such nature as shall be satisfactory to the High Court, and within such reasonable time as shall be fixed by that Court, and that upon his giving such security his appeal shall be restored to the files of that Court." The appeal will then be heard by the High Court. It should be also ordered that the Respondent should pay the costs of the petition of the 2nd of July, 1885, and the hearing thereon. Their Lordships will humbly advise Her Majesty to that effect.

The Respondent will pay the costs of the present appeal, but when those costs are taxed it will be proper for the Registrar,

(1) Law Rep. 13 Ind. Ap. 57.

in considering what should be allowed for the costs of perusal of the record, to allow only so much as is applicable to the question which has been argued before their Lordships and now decided.

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Solicitors for Appellant : *Watkins & Lattey.*

Solicitors for Respondent : *T. L. Wilson & Co.*

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KUMAR BISESWAR ROY AND ANOTHER . PLAINTIFFS;

AND

KUMAR SHOSHI SIKHARESWAR ROY AND ANOTHER . . . . . } DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Bengal Court of Wards Act (IX of 1879), s. 55—Suit without sanction of Court of Wards.

Where under sect. 55 of the *Bengal Court of Wards Act* (IX of 1879), the manager of an estate authorized the Plaintiff, in order to save limitation, to institute a suit on behalf of the wards, and the Court of Wards subsequently refused its sanction thereto :—

Held, that the Subordinate Judge was right in ordering such suit to be struck off the file, as incapable under the said section of being prosecuted.

APPEAL from a decree of the High Court (Jan. 26, 1886) affirming an order of the Subordinate Judge of *Rajshahye* (Aug. 14, 1880).

The Appellants when the suit was commenced were infants whose estate had been made over to the Court of Wards.

On the 17th of November, 1879, the manager, under the orders of the collector in charge of the estate, authorized *Biseswar Moitra*, under sect. 55 of Bengal Act IX of 1879, to institute a suit on behalf of the minor Plaintiffs at his own risk, in order to prevent the application of limitation. Accordingly the plaint was filed on the same day.

* *Present* :—LORD HOBHOUSE, LORD ASHBOURNE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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On the 25th of February, 1880, the Revenue Board passed an order in which they expressed their willingness to sanction the suit, and pointed out that a new guardian must be appointed under sect. 42 of Act IX of 1879, in place of the former guardian who had died. They also suggested that the new guardian might conveniently be nominated by the Court of Wards as guardian *ad litem* under sect. 51.

On the 28th of May, 1880, the collector wrote to the Government pleader, directing him to inform the Court and *Biseswar Moitra* that the Court of Wards did not authorize the suit.

On the 14th of August, 1880, the Subordinate Judge of *Rajshahye*, after a number of postponements of the suit, dismissed the plaint for want of authority from the Court of Wards.

On the 27th of February, 1884, *Kumar Biseswar* petitioned the Subordinate Judge that the suit might be restored to the file, he having attained majority, and being placed in possession by the Court of Wards. A similar petition was put in by *Kumar Kasiswar*, the other Appellant, who stated that as he became of full age at eighteen, the Court of Wards had retired from the management of the estate.

On the 30th of June, 1884, the Subordinate Judge dismissed both petitions, being of opinion that the plaint had been properly dismissed, and that he had no jurisdiction to restore it.

An appeal against this order, or, in the alternative, against the order of the 14th of August, 1880, was admitted by the High Court on the 15th of January, 1885, and on the 26th of January, 1886, the High Court pronounced its judgment, affirming the order complained of, and fully dismissing the suit. After examining the provisions of *Bengal Act IX* of 1879, and what had taken place in the suit, they summed up their view as follows:—

"In such suits either the manager, or the collector, or some other person appointed by an order of the Court of Wards, must be named as next friend. In the present case, neither the collector, nor the manager, nor any person authorized by the Court of Wards was named as next friend, and we, therefore, find that the suit was brought in an improper form, and for this reason alone we think that it was properly rejected."

Doyne, for the Appellants.

Mayne, for the Respondents, was not called on.

The judgment of their Lordships was delivered by

LORD HOBHOUSE :—

The matter in dispute in this case lies within a very narrow compass. The 55th section of the *Bengal Court of Wards Act* (Act IX of 1879) provides that " No suit shall be brought on behalf of any ward unless the same be authorized by some order of the Court"—(that is the Court of Wards) : "Provided that a manager may authorize a plaint to be filed in order to prevent a suit from being barred by the Law of Limitation, but such suit shall not be afterwards proceeded with, except under the sanction of the Court." The Appellants in the year 1879 were wards of Court ; and *Hurrogobind Bose* had been appointed manager of their estate. On the 17th of November, 1879, *Hurrogobind Bose* wrote a letter to the Plaintiff in this suit, *Biseswar Moitra*, authorizing him to institute a suit on behalf of the wards at his own risk and responsibility, in order to prevent the application of limitation. The letter refers to applications to the collector, and to the commissioner, and to opinions expressed by them ; but it does not mention any order of the Court of Wards, nor does it purport to come from the Court of Wards at all. It is an authority of the manager under the second clause of sect. 55 of the Act to *Biseswar Moitra* to institute a suit for the purpose of saving the time of limitation. On the same day the Plaintiff instituted the suit. It seems to have been doubted in the High Court whether he had authority to institute the suit. Their Lordships consider that the manager had the right to give *Biseswar Moitra* the authority, and that the suit was properly instituted. Then came the question whether the suit should be prosecuted. *Biseswar Moitra* took immediate steps to get an authority from the Court of Wards to prosecute the suit, and he applied to the Civil Court several times to give him time to produce his authority to prosecute the suit. On the 8th of May, 1880, a letter was written, which, if it came from the Court of Wards, would shew that they were then of opinion that the suit should go on, for it purports to be an authority

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from the officiating collector of *Rajshahye*, authorizing *Biseswar Moitra* to act as next friend of the infants. But it does not purport to come from the Court of Wards, and it is quite clear that nobody treated it as being an authority from the Court of Wards, because on the 10th of May an application was made to the Civil Court to postpone the case, without any mention of the letter of the 8th of May as being an authority to prosecute the suit. However that may be, on the 28th of May a letter was written which does purport to convey the opinion of the Court of Wards. It was written by the Assistant Collector to the Government pleader, and the writer requested the Government pleader "to take steps at once to inform the Court, and intimate to the Mookhtar of the junior branch, *Biseswar Moitra*, that the Court of Wards does not authorize the suit." That letter was communicated to the Court. On the same day an application was made to the Court, and the letter was produced which refused sanction to the prosecution of the case. Upon that the Plaintiff applied for time to get the sanction of the Court of Wards, and time was given him, and on two subsequent occasions further time was given that he might get the sanction of the Court of Wards. Ultimately the time was enlarged until the 14th of August, and on the 14th of August, there being nothing said in contradiction of the letter of the 28th of May, the Subordinate Judge ordered that the case should be struck off the file. It appears to their Lordships, not only that he had jurisdiction to strike the case off the file, but that he was quite right in doing so. He had before him a suit which, however lawfully instituted, was by law incapable of being prosecuted without a sanction which the Plaintiff was unable to obtain.

Their Lordships, therefore, are of opinion that this appeal should be dismissed with costs; and they will humbly advise Her Majesty in accordance with that opinion.

Solicitors for the Appellants: *Watkins & Lattey.*

Solicitors for the Respondents: *T. L. Wilson & Co.*

MOHUNT MODHUSUDAN DAS . . . . PLAINTIFF ; J. C.* 1889

AND

KRISHNA PRAPANNA RAMANING DAS AND ANOTHER . . . . . } DEFENDANTS. Nov. 15

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice—Civil Procedure Code, s. 549—Security—Extension of Time.

Where the High Court had ordered security to be given by an Appellant, and had heard and refused an application for extension of time for giving the same, their Lordships, under the circumstances of the case, declined to interfere with such exercise of discretion and held that the appeal was properly dismissed under sect. 549, Civil Procedure Code.

APPEAL from two orders of the High Court (Aug. 21, and Nov. 24, 1885), and a further order and decree (Dec. 8, 1885), whereby the Appellant's appeal to the High Court from a decree of the Subordinate Judge of *Cuttack* (Dec. 8, 1884) had been dismissed.

On the 3rd of July, 1885, the High Court, under sect. 549, Civil Procedure Code, issued a rule *nisi* calling upon the Appellant to shew cause why he should not furnish security for the costs of the Respondent in the High Court and in the Court below, and why in default thereof the appeal should not be rejected.

That order was made on the petition of the Defendant, stating that the Appellant was possessed of no means of his own, and that *Baboo Kalipodo Banerji*, a wealthy zemindar of *Cuttack*, had caused the suit and appeal to be filed by the Appellant, and had been paying all the expenses of conducting the same.

The Appellant admitted that the suit and appeal had been carried on with money wholly raised and given to him by people of influence and position, of whom *Baboo Kalipodo Banerji* was one. The High Court considered that this was not a sufficient answer, and that the Appellant was clearly able to raise whatever

**Present* :—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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money he wanted for the purpose of the litigation. The rule was accordingly made absolute on the 21st of August, 1885.

Subsequently the Appellant (within the time limited by the order of the 21st of August, 1885) applied for an extension of time for one month, stating that the security bond had been executed and registered at *Cuttack*, and would be forwarded to the High Court in the course of a few weeks. This application was refused on the 24th of November, 1885.

On the 7th of December the Appellant petitioned, stating that he wished to tender to the High Court a security bond executed by *Kalipodo Banerji*, and prayed that the amount for which the securrity was to be furnished be ascertained, and direction be given as to the Court in which the bond was to be filed, and for further time.

The Respondents, on the other hand, petitioned on the same date, that as the Appellant had not furnished the security within the time allowed, his appeal be rejected. On the following day the High Court granted the Respondents' application, on the ground that ample time had been given to the Appellant, and that, on his own shewing, he "did not take such steps as, with any reasonable probability, could enable him to put in the security in time."

C. W. Arathoon, for the Appellant, cited *Haidri Bai* v. *East Indian Railway Company* (1).

Cowell, for the Respondents, was not heard.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

Their Lordships are of opinion that this appeal ought to be dismissed. The Court exercised their discretion on the 20th of November as to whether they would enlarge the time for giving security for costs. Having considered the evidence and all the facts which were brought before them at that time, they exercised their discretion, and thought it was a case in which they ought not to enlarge the time. Their Lordships think that this is not

(1) Ind. L. R. 1 Allah. 688.

a case with which they ought to interfere. The appeal upon the merits of the case was under the circumstances properly dismissed under sect. 549 of the Civil Procedure Code.

Their Lordships will therefore humbly recommend Her Majesty that this appeal be dismissed, and dismissed with costs.

Solicitors for the Appellant : *T. L. Wilson & Co.*

Solicitors for the Respondents : *Sanderson, Holland & Adkin.*

RAI BABU MAHABIR PERSHAD. . . DEFENDANT;

AND

RAI MARKUNDA NATH SAHAI AND ANOTHER . . . . . } PLAINTIFFS.

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Nov. 14, 20.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Mitakshara—Execution Sale under decree against Father—Rights of Son.

Where in an execution sale under a decree against a Hindu father, the joint family being governed by Mitakshara law, the entirety of the joint family estate has been sold, *held*, that the only claim which the son has to set up against the purchaser his right as a co-sharer, results from proof that such sale has been made in order to satisfy debts of his father or other ancestor contracted for immoral purposes.

Nanomi Babuasin v. *Modun Mohun* (Law Rep. 13 Ind. Ap. 1) and *Bhagbut Pershad* v. *Girja Koer* (Law Rep. 15 Ind. Ap. 99) followed.

APPEAL from a decree of the High Court (July 16, 1885) varying a decree of the Subordinate Judge of *Sarun* (June 10, 1884).

The facts are stated in the judgment of their Lordships.

The Subordinate Judge held that the right, title and interest of the father *Moheswar* alone passed at the sale, and based his decree on that finding. He found that "it is neither proved on the one hand that there was any legal necessity for the loan, nor on the other that the particular sum borrowed was expended by *Moheswar* for immoral purposes."

The High Court held that it was "unnecessary to consider the

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nature of the debt for which the decree was obtained. It was for the Appellant, who stands in the shoes of the decree-holder, the auction-purchaser, to shew that the debt was a charge on the joint estate ; and if it was necessary to decide the point, I should hold that he had failed."

But they held that only the rights and interest of *Moheswar* were sold. The *ratio decidendi* was thus expressed : " When the decree-holder proceeded to sell in execution of his decree, not the property which *Moheswar* in his representative character had mortgaged, and which the decree made liable for the debt" (meaning the 6 pie share which formed the subject of *Chowaram's* bond), " but his rights and interest in the whole property, how can it be said that he brought to sale the whole property, and not merely the interest which *Moheswar* had in it ? The conduct of the decree-holder, so far from supporting, goes far to negative any inference that he either intended to sell, or did in fact sell, the whole property. The decree-holder, being himself the purchaser, cannot under such circumstances claim to have acquired more than was in terms sold. There was clearly, moreover, no necessity to sell the whole joint property to realise a debt of something less than Rs.1600, to secure which the decree-holder had accepted a mortgage of a 6 pie share, and the price paid, so far as this is any test of what was offered for sale, was far below its real value. The Plaintiff's valuation of Rs.50,000 seems exaggerated, but the property was worth at a moderate computation not less than Rs.30,000. It is true that there were incumbrances, but the principal incumbrancer was the Appellant himself ; and the first thing he did after the sale was to apply for and to obtain the payment of his other mortgage debt out of the surplus sale proceeds. So that the property was practically sold free of the incumbrances, though there was no intimation to that effect."

Mayne, and *Cowell*, for the Appellant, submitted that the sale in question was intended by the Court which executed the decree, with the knowledge of all parties, including the Respondents, to transfer the whole joint family interest in the estate which was sold. The evidence established that beyond doubt or dispute,

The Subordinate Judge, too, was right in holding that *Moheswar* was not found to have applied to immoral purposes the loan in respect of which *Chowaram* had obtained a decree against him. Accordingly the infant Respondent, by reason of the son's liability for his father's debts (not incurred for immoral purposes), could not impeach the sale, or limit its application exclusively to the father's share. The decree being founded on a debt untainted with immorality, it followed that the son's interest in the estate could not be set up against the creditors' remedies. It bound the entirety of the estate, because it was founded on a debt which the father had incurred in his representative character as head of the joint family. Reference was made to *Deendyal Lal* v. *Jugdeep Narain Singh* (1); *Muddun Takur* v. *Kantoo Lall* (2); *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (3); *Nanomi Babuasin* v. *Modun Mohun* (4); *Simbhunath Panday* v. *Golab Singh* (5); *Bhagbut Pershad* v. *Mussamut Girja Koer* (6); *Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kounden* (7).

The Respondents did not appear.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The sole question in this appeal is whether the purchaser, whom the Defendant represents, acquired the entirety of the 5*a*. 4*p*. which were put up to sale in execution, or only such share as the judgment debtor, *Moheswar Nath*, would take on a partition. Other questions have been raised in the courts below, which are not relevant to this appeal. It has been considered whether the sale was necessary for the benefit of the family estate; but the question is whether the Plaintiff, who is the son of the judgment debtor, can set up his right as a co-sharer to impeach a sale decreed against his father for the purpose of defraying the debts of his father and grandfather. He can only

(1) Law Rep. 4 Ind. Ap. 247.
(2) Law Rep. 1 Ind Ap. 321.
(3) Law Rep. 6 Ind. Ap. 88.
(4) Law Rep. 13 Ind. Ap. 1
(5) Law Rep. 14 Ind. Ap. 80.
(6) Law Rep. 15 Ind. Ap. 99.
(7) Law Rep. 16 Ind. Ap. 1.

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do so on condition that he shews the debts to have been contracted for immoral purposes, and that issue has been found against him in this suit. Again, the First Court then examined the circumstances at considerable length to shew that the purchaser bought the property subject to incumbrances, and that his purchase-money ought not to have been applied, as the Court in fact applied it, to the payment of those incumbrances. But if the Plaintiff could have raised any such case as that, he must have done so in a suit differently framed in point of parties, of allegations, of prayer, of issues, and of proofs. Except for the issue raised as to immorality, this suit is solely for the purpose of treating the Defendant as nothing more than a co-sharer in the estate, and the decree which the Plaintiff has obtained does so treat him.

There have been of late years a great number of suits of this kind, and some difficulties have been felt as to the proper mode of treating them. It is to be hoped that recent decisions by this Committee have lessened these difficulties. At all events, their Lordships feel none in this case, treating it on the principles laid down in the cases reported in *Nanomi Babuasin and Others* v. *Modun Mohun and Others* (1), and *Bhagbut Pershad and Others* v. *Girja Koer and Others* (2), and addressing themselves to the question of fact, whether the thing meant to be sold and bought was the entirety of the estate, or only a share in it.

It would be more convenient if the record contained the whole of the proceedings in the execution and sale, because they must always be important evidence, often the best, as to the nature of the thing sold. In this case, the application for attachment and sale, and the orders made thereon, and the notification of sale, are not to be found, and their Lordships are left to infer their tenor from an adverse petition presented on behalf of the Plaintiff, and from the sale certificate. The difficulty is increased by the circumstance that there were three, or probably four, decrees then standing against *Moheswar*; whereas the sale proceeded on one of them founded on a mortgage to one *Chowaram* of only a fraction of the estate. From the pleadings and judgments, their Lordships conclude that in some way not explained, the various

(1) Law Rep. 13 Ind. Ap. 1.

(2) Law Rep. 15 Ind. Ap. 99.

creditors combined to have the estate sold for the common benefit. At all events, no difficulty on this score has been felt in the courts below.

Chowaram's decree, dated the 7th of March, 1874, is for the realization of a sum of money out of the property mortgaged to him by *Moheswar*, viz., "my rights and interest in 6 pie out of 5*a*. 4*p*. of the entire 16 annas" of the estate in question.

The day fixed for the sale was the 5th of January, 1875. On the 4th of January, 1875, the Plaintiff filed a plaint against *Chowaram* and *Moheswar*, in which, after alleging fraud and immorality, he claimed that "the ancestral property of the Plaintiff which he has inherited from his grandfather ought not to be sold in satisfaction of such illegal and personal debts"; and he prayed for a declaration protecting his estate.

On the next day the Plaintiff's pleader presented a petition in the execution proceeding, stating that the 5*a*. 4*p*. share of *Mouzah Udoypore*, &c., "which is the ancestral property of my client, is to be sold to-day in this Court." The petition then states the suit commenced the day before, and prays postponement of the sale till the suit should be disposed of.

That petition was rejected, not on the ground that the thing to be sold was only the share of *Moheswar*, which could not prejudice the Plaintiff, but on this ground, that "the Plaintiff is at liberty, in case of the sale taking place, to make the purchaser a defendant in his suit, so that he (the purchaser) may defend the right purchased by him."

It is hardly possible to make it clearer that all parties, judgment creditors, judgment debtor, the Plaintiff and his advisers, and the Court itself, considered that the thing put up to sale was the entirety of the estate.

The sale certificate was issued on the 6th of February, 1875, to the vakeel of *Chowaram*, the decree-holder. After stating that all the "right, interest, and connection which the judgment debtor had in the property" had been purchased "from the decree-holder," and "that in future the certificate shall be considered as a good evidence of transfer of the right and interest of the judgment debtor," it describes the property thus :—

"Five annas four pie of *Mouzah Udoypor* alias *Maharajgunge*,

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pergunnah *Cherand*, which belonged to the judgment debtor, *Rai Moheshwar Nath*, is sold (for) Rs.10,000."

The Procedure Code at that time required that property sold in execution should be described as the right, title, and interest of the judgment debtor, and it has been held in many cases that the presence of these words in the sale certificate is consistent with the sale of every interest which the judgment debtor might have sold, and does not necessarily import that when the father of a joint family is the judgment debtor, nothing is sold but his interest as a co-sharer. It is a question of fact in each case, and in this case their Lordships think that the transactions of the 4th and 5th of January, 1875, and the description of the property in the sale certificate, are conclusive to shew that the entire *corpus* of the estate was sold.

They are of opinion that the High Court should have reversed the decree of the Subordinate Judge and have dismissed the suit, with costs, and that a decree to that effect should now be made in reversal of the decree of the High Court. The Appellant should have his costs in the High Court and also his costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

Solicitors for the Appellant : *Sanderson, Holland, & Adkin.*

KISSORYMOHUN ROY AND OTHERS . . DEFENDANTS; J. C.*

AND 1889

HURSOOK DASS . . . . . PLAINTIFF. *June* 23; *Aug.* 1.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Execution Sale—Wrongful Attachment—Damages—Liability of Attaching Creditor.

Where certain bales of jute belonging to the Respondent and not the judgment debtor had been attached by the Appellants on the 28th of November, 1883, in a suit to which he was not a party, and sold by order of the Court in June, 1884, at a price which, owing to the intermediate fall in the market, was about half of what they were worth at the date of the attachment:—

Held, that such wrongful attachment being according to the law and practice in *India* the direct act of the Appellants, and not of the officer of the Court, the Respondent was entitled to recover full indemnity, and that he was not bound to prove that the Appellants had litigated maliciously and without probable cause.

APPEAL from a decree of the High Court (March 13, 1886), affirming a decree of Mr. Justice *Wilson* (Dec. 20, 1884), in favour of the Respondent, the Plaintiff in the suit.

The facts are stated in the judgment of their Lordships.

The prayer of the plaint was:—

1. For a declaration that on the 7th of November, 1883, he became, and that he was at the time of the attachment, the absolute proprietor of 848 bales of jute which had been attached.

2. That if the Court should find that he was not the proprietor of the said 848 bales of jute as against the Appellants, then he should be declared to have a lien on the same, and on 70 other bales of jute, the 2 bales of dowrah, and 2 bales of jute cuttings for the sums advanced by him to the *Deys* amounting to Rs.42,025 12*a*. 6*p*.

3. That if the said property should be sold, the Defendants in the said suit should be decreed to pay to him Rs.25,355 as the market value of the said jute.

* *Present*:—LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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The judgment of Chief Justice *Garth* was as follows so far as is material :—

"The learned Judge in the Court below has decided in the Plaintiff's favour. He considered that, by the contract of the 7th of November, the property in the jute passed to the Plaintiff, and that he was entitled to recover the full value of 838 bales, which were proved at the trial to belong to him under and by virtue of the said sale. But as in the meantime the goods had been sold in the *Alipore* Court, the learned Judge decreed, that if the Plaintiff should receive the proceeds of sale from the *Alipore* Court, he was entitled to recover only the difference between the sum so received, and the market value of the 838 bales.

"There was another lot of seventy-four bales, which the learned Judge considered were not the Plaintiff's property, but for which he had a lien under the agreement of the 2nd October for the sum of Rs.1609 10*a*. 3*p*.

"There was also another sum of Rs.268 11*a*. 9*p*. found to be due to him from the *Deys*, for which he also had a lien on the seventy-four bales.

"Against this judgment the Defendants have appealed to this Court.

"It was contended by the Defendants' counsel, Mr. *Woodroffe*, that the learned Judge had altogether misunderstood the nature of this suit. That it was a suit of a peculiar nature brought under sect. 283 of the Civil Procedure Code, and that it was in the nature of an appeal from the decision of the Subordinate Judge. Mr. *Woodroffe* went so far as to insist that the judgment of the Subordinate Judge, as well as the proceedings in the claim case, were as much the subject of appeal before Mr. Justice *Wilson*, when he tried this cause as Mr. Justice *Wilson's* judgment and the proceedings in this case, are now before us for the purposes of this appeal. In support of this view, Mr. *Woodroffe* referred us to the case of *Mitchell* v. *Mathura Dass* (1). The judgment in that case certainly does contain a statement to the effect that a suit under sect. 283 is in substance a suit brought to reverse the order in the execution proceedings. But we do not under-

(1) L. R. 12 Ind. Ap. 150.

stand that their Lordships intended to lay down any such rule as would support Mr. *Woodroffe's* contention.

"The class of suits which are now brought under sect. 283 of the Code are no novelty. They were constantly brought under the corresponding section of the Code of 1859; and they are neither described in the Code, nor dealt with in practice, as appeals from the orders of the lower Court. They are brought no doubt for the purpose of establishing rights which have been negatived in the execution proceedings; but they are substantive suits to all intents and purposes; and must be tried like any other suits, subject to the ordinary rules of procedure and evidence. In this case Mr. *Woodroffe* complains that the judgment in the claim case was not duly considered by Mr. Justice *Wilson*; it was produced no doubt in Court before the learned Judge; but we do not find that any attempt was made by the Defendants to make that judgment evidence, nor do we see (if there had been such an attempt) how the judgment would have been properly receivable.

"The Defendants then contended, on the merits of the case, that the bales in question were not the Plaintiff's property, and that the contract of the 7th of November was a fictitious transaction. This was the real question in the Court below.

"There were no doubt some circumstances of suspicion about the Plaintiff's case, which were very fully brought to our attention. Amongst others, it was contended that the alleged letter from the *Deys* of the 3rd of October was a pure fiction. The Defendant *Borodakant Dey* denies that it was signed either by him or his brother, and it certainly was not produced at the hearing of the claim case, nor mentioned in the plaint in this suit, although it was mentioned in the affidavit of documents. Mr. *Woodroffe* says that this document was not properly dealt with by the Court below, inasmuch as the learned Judge did not use it as one of the tests in deciding whether the Plaintiff's story was true or false; but that, having satisfied himself of the truth of the Plaintiff's story in other respects, he found this document to be genuine, because he believed the rest of the Plaintiff's case to be true.

"It seems to me that we have no sufficient reason to assume

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that the learned Judge did not deal with the letter as a test of the truth of the Plaintiff's story; but I quite agree with the Appellant's counsel, that it was quite right to use it for that purpose, and we have undoubtedly so taken it into consideration upon this appeal. Our impression is that the letter is genuine. I mistrust altogether the evidence of *Borodakant Dey*, who denies the signature, and I do not attribute much weight to its not having been produced in the claim case, or even mentioned in the plaint in this suit; because, assuming that the sale to the Plaintiff on the 7th day of November was valid, their letter of the 3rd of October was of no value to the Plaintiff's case. If the Plaintiff has been obliged to rely wholly on his lien, the letter might have been material; but even then, having regard to the main facts proved, I think the lien of the Plaintiff would have been established without it. Then, again, it has been urged upon us, that the conduct of the Plaintiff himself, and what he said to the nazir at the time when the attachment was made, was inconsistent with the fact of the goods having been sold to the Plaintiff on the 7th of November; but it must be borne in mind that the Plaintiff is an old man, and was evidently in a high state of excitement when the nazir proposed to move the goods, which may account for his endeavouring to persuade the nazir that some of the goods belonged to third persons. But the real test, as it seems to me, of the truth of the Plaintiff's case, is, whether, in point of fact, the Plaintiff had advanced to the *Dey* Defendants on the 7th day of November the sum which he is said to have advanced, and whether they really owed him the balance for which the goods were sold. This is the substantial question in this case.

"The Defendant, *Borodakant Dey*, undoubtedly did all he could to defeat the Plaintiff's claim; but his evidence was clearly that of a dishonest man. It is an admitted fact in the case, that from time to time, from September up to the 7th of November, large quantities of jute were sent by the *Deys* to the Plaintiff's premises; and it is also perfectly clear from the Defendant's own books, that advances to a large amount had been made by the Plaintiff to the *Deys* during that period. Then as the learned Judge in the Court below observes, the Plaintiff's

books were all produced, the rokur, nukul, ledger, hatchitta, &c., which are all perfectly kept, and dovetailed into one another in such a way as to leave no reasonable doubt of their genuineness. In fact, this part of the Plaintiff's case was scarcely contested.

"Under these circumstances the probability seems very great, that the Plaintiff, a man of business, when he heard that the *Deys* were in difficulties, and were being sued by their creditors, should at once have insisted upon some means of securing to himself the sums he had advanced. There seems no good reason for supposing that the contract of the 7th of November was otherwise than perfectly *bona fide*; and although the transfer of the goods into the Plaintiff's books as belonging to the Plaintiff was not made until some days afterwards, it referred to the contract of the 7th of November, and at that time there was no more reason to suppose, than there was on the 7th of November, that the attachment would be lodged on the 25th.

"I therefore am entirely of opinion that the Plaintiff's story is substantially true; and I also think that the Plaintiff is entitled to recover from the *Roy* Defendants the sums which have been awarded him by the Court below. As regards the amount awarded to the Plaintiff, a point which has been strongly urged upon us is this: that the Defendants are not answerable for any depreciation which the goods may have undergone from the time when they were first attached to the time when they were sold by the *Alipore* Court on the 30th day of June, 1884; and, consequently, that the utmost which the Plaintiff could be entitled to was the sum for which the goods were then sold.

"Mr. *Evans* contended,—First, that as the claim made in the Sub-Judge's Court was entirely the act of the Plaintiff, the Defendants were not answerable for the consequences of any delay which took place in the course of those proceedings.

"Secondly, that, even assuming the Defendants to have been liable in the first instance, they were no longer liable for any depreciation of the property, after they had proposed to sell the goods, and the Court, at the instance of the Plaintiff, had refused to order a sale.

"In support of this contention, the case of *Walker* v. *Olding* (1)

(1) 1 H. & C. 621.

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was relied upon, as shewing that when the Court had made an order for the sale of goods on an interpleader issue, the execution-creditor, though he should turn out to be a wrongdoer, was not answerable for any loss which might have occurred to the true owner in consequence of the sale.

"It seems to me, that there is no good ground for either of these contentions. It must be borne in mind in the first place that the attachment of the 25th of November was an *attachment before judgment*, and that the value of the goods attached was four or five times as large as the sum for which the *Roys* were bringing their suit. The judgment was not obtained in that suit until the 7th day of January, 1884.

"The attachment was clearly a wrongful act on the part of the *Roys*, which deprived the Plaintiff of the possession of the goods, and of his power of disposing of them. Moreover, there was no pretence, so far as I can see, for attaching goods of so large a value; and if in this respect the *Roys* made a mistake in the first instance, they might have rectified it afterwards by relieving some of the goods from attachment. But this they did not do. It was suggested by Mr. *Evans*, that there were other attachments also made by other creditors of the *Deys*, upon the same goods. But those attachments were subsequent to that of the *Roys*; and it is by no means improbable that they were made in consequence of the *Roys*' attachment. At any rate the fact that other wrongdoers had also attached the goods can make no difference whatever in the extent of the *Roys*' liability.

"Then as to the second point, it was argued, that the Plaintiff might have allowed the goods to be sold, when the *Roys* applied to the Court for that purpose. But the Plaintiff was surely justified in refusing to allow his goods to be sold by the Court at what would obviously have been a forced sale; especially considering how large their value was, as compared with the amount of the *Roys*' decree. A wrongdoer under such circumstances has no right to dictate to the man whom he has wronged, how the goods, which have been wrongfully seized, should be disposed of. He has no right to say, 'now unless you consent that these goods of yours, which I have wrongfully attached, shall be sold by the Court, you must be answerable for any depreciation which

may afterwards occur in the value of them.' If this were the position, in which a man, whose goods have been seized in execution, were to be placed by making a claim in the execution proceedings, it would in the generality of cases be the height of folly to make any such claim. The safer course would be to bring a regular suit at once.

"No authority was cited to us, which gives colour to such a proposition; and it seems to me that the argument is quite untenable. The rule in *England* to which Mr. *Evans* referred, and which is illustrated by the case of *Walker* v. *Olding*, does not in my opinion assist him. In that case certain goods of a third party had been taken in execution by an execution creditor. The third party took out an interpleader summons, which was heard in due course before the Judge in chambers, who ordered (as he had power to do) that the goods should be sold, and the question as to the ownership tried by an arbitrator. The goods having been found to be the property of the Claimant, the latter insisted that the execution creditor ought to pay the loss which he (the Claimant) had sustained in consequence of the sale of the goods. But the Court held that he was not entitled to recover that loss. Up to the time of the sale, the execution creditor would be liable for any depreciation of the goods; but as the sale itself was the act of the Court, the Claimant could recover no damages on that account.

"Then lastly, it was insisted by Mr. *Evans* that in this case the Plaintiff did eventually consent to the sale. But there really seems to be nothing in this point. The goods eventually were ordered to be sold by the *Alipore* Court; and all that the Plaintiff proposed and consented to, was, that they should be sold by his own brokers Messrs. *Landale & Morgan*, instead of by the Court, as they were likely in that way to command a better price.

"Lastly, the Appellants say, that there is a difficulty in obtaining the price of the goods, Rs.12,703 12*a*. from the *Alipore* Court. If there is any such difficulty, it is one which has clearly not been caused by the Plaintiff. The Plaintiff is, *prima facie*, entitled to be paid by the Defendants the sum which has been awarded to him by the Court below. On the other hand, the

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Plaintiff is bound to assist the Defendants to obtain the Rs.12,703 12*a*. from the *Alipore* Court. If the difficulty in obtaining this money arises from causes over which the Plaintiff has no control, the Defendants must be the sufferers.

"The appeal is dismissed with costs on scale 2."

Finlay, Q. C., and *Doyne*, for the Appellants, contended that the Appellants in November, 1883, acted *bona fide* and legally in attaching the jute in question, and should not be made liable as if they in so doing had converted to their own use property which all along remained in the custody of the Court. The mere fact of attaching more than was sufficient to cover the claim did not make them liable ; such' excessive seizure cannot be regarded as a seizure without reasonable cause. The interpleader order is the act of the Court, and any one who gets the Court to issue it can only be held liable if he does so without reasonable and probable cause.

[Reference was made to *Mitchell* v. *Mathura Dass* (1) ; *Walker* v. *Olding* (2); *The Quartz Hill Consolidated Gold Mining Company* v. *Eyre* (3).]

It must be established in order to render the Appellants liable that the proceedings were malicious, otherwise they cannot be held liable for damages, although they may be liable to have the goods given up by the Court, if still existing in specie. It was not a case of wilfully misleading the Court into action. Further, the Respondent was a consenting party to the sale, and cannot by reason of such sale be in a better position than he would have been in if it had remained unsold till the decision of the suit. In that case he would have been entitled only to the jute in specie, and to such damages as he could have proved to have resulted from the illegal action (if any) of the Appellants.

Cowie, Q. C., and *Branson*, for the Respondent, submitted that the case should be decided upon this principle, that the goods were the property of the Respondent, and that the attachment was illegal. It is not alleged to have been malicious, and as to

(1) Law Rep. 12 Ind. Ap. 150. (2) 1 H. & C. 621.
(3) 11 Q. B. D. 674.

whether it was without reasonable and probable cause there are no materials for deciding. The Defendants acted illegally in setting the *Alipore* Court in motion. That is the foundation of the Respondent's claim. If he had brought an action at once for a declaration of his right to the goods, the measure of damages for non-delivery would leave him the value of the goods at the date of the attachment. All that has been done since the attachment was in the interests of the Defendants, and on their responsibility. The Defendants are in the same position as they would be in *England* if they actually directed the sheriff's officer what to take instead of leaving him to act on his own responsibility.

Finlay, Q. C., replied.

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The judgment of their Lordships was delivered by

LORD WATSON:—

The present Appellants, in a suit brought by them before the Subordinate Judge of the 24-Pergannahs, obtained decree for a debt of Rs. 4523 against two persons, who, in these proceedings, are called the *Deys*, on the 7th of January, 1884. During its dependence, the Appellants made application, in terms of sect. 483 of the Civil Procedure Code, for attachment in security of 1900 bales of jute, more or less, then lying in the present Respondent's premises at *Chitpore*, which they alleged to be the property of one of the *Deys*, the Defendants in the suit. On the 28th of November, 1883, a perwana was issued, directing the nazir of the Court "to proceed to the spot and make an inventory of the bales of jute actually attached, *the same will be identified by Hari Churn Sircar on Plaintiff's behalf.*"

The nazir, in execution of the warrant, proceeded to the Respondent's premises on the 28th of November, and there attached a quantity of jute which was pointed out to him by the Appellants as the property of *Borodakant Dey*, consisting of 148 bales which the Respondent alleged had been purchased by him from the *Deys*, and seventy-four bales over which he alleged that they had given him a lien for advances. The Respondent then preferred a claim to the goods attached under sect. 278 of

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the Code, which was disallowed, after inquiry, by the Subordinate Judge, on the 15th of April, 1884.

On the 28th of April, 1884, the Respondent, as authorized by sect. 283 of the Code, instituted the suit in which this appeal is taken before the High Court at *Calcutta*, in order to establish the rights which he claimed in the goods, and for damages in respect of their wrongful attachment. By decree dated the 28th of December, 1884, *Wilson*, J., declared that the Respondent was sole and absolute proprietor of the 848 bales, and had a valid and effectual lien upon the remainder for advances exceeding their value, and assessed damages at Rs. 24,584, being the market value of the jute at the time of the attachment. The Court of Appeal, on the 13th of March, 1886, affirmed the judgment of *Wilson*, J., with costs.

The decree of the Subordinate Judge dismissing the Respondent's claim was not brought under review in these proceedings before the High Court; but the effect of the judgment of the High Court has been to supersede his decree and render it altogether inconclusive. The goods in question were sold in June or July, 1884, by order of the Subordinate Judge, when owing to the intermediate fall in the market, the price obtained for them was about half of what they were worth at the date of the attachment.

The validity of the Respondent's claim to these 922 bales of jute depends upon the authenticity of the documents of title produced and founded on by him, which has been affirmed in this action by the concurrent findings of both Courts below. In the argument addressed to their Lordships the Appellants did not impeach these findings; but they maintained that damages were assessed on an erroneous principle, and that the Respondent was not entitled to recover more than the price which the jute realized when sold by order of the Subordinate Judge in the year 1884.

The Appellants argued that to condemn them in payment of the market value of the jute on the 28th of November, 1883, was in reality to make them responsible for delay occasioned by litigation, and that the Respondent could not recover the difference between that value and the depreciated price arising from

such delay, unless he alleged and proved that they had litigated maliciously and without probable cause. That is a rule which obtains between the parties to a suit when the defendant suffers loss through its institution and dependence. It does not apply to proceedings taken by the injured party, after the wrong is done, in order to obtain redress. But, in this case, there has been no action and no proceeding instituted by the Appellants against the Respondent *Hursook Dass*. The summary proceeding under sect. 278, was taken by the Respondent for the purpose of getting the release of an attachment issued in a suit to which he was not a party; and it does not appear to their Lordships that, in order to entitle him to recover full indemnity for the wrongful attachment of his goods, the Respondent is bound to allege and prove that the Appellants resisted his application maliciously, and without probable cause.

The Appellants mainly relied upon the English case of *Walker* v. *Olding* (1), which was cited as an authority for the proposition that a judgment creditor is not responsible for the consequences of a sale, under a judicial order, of goods illegally taken in execution in satisfaction of his debt. *Walker* v. *Olding* would have been an authority of importance had the law of execution been the same in *India* as in *England*, but there is in that respect no analogy between the two systems. In *England*, the execution of a decree for money is intrusted to the sheriff, an officer who is bound to use his own discretion, and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment debtor. In *India*, warrants for attachment in security are issued on the *ex parte* application of the creditor, who is bound to specify the property which he desires to attach, and its estimated value. In the present case, by the terms of the perwana, no discretion was allowed to the officer of Court in regard to the selection of the goods which he attached; his only function was to secure under legal fence all bales of jute in the Respondent's premises which were pointed out by the Appellants. The illegal attachment of the Respondent's jute on the 28th of November, 1883, was thus the direct act of the Appellants, for which they became immediately responsible in law;

(1) 1 H. & C. 621.

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and the litigation and delay, and consequent depreciation of the jute, being the natural and necessary consequences of their unlawful act, their Lordships are of opinion that the liability which they incurred has been rightly estimated at the value of the goods upon the day of the attachment.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The Appellants must pay the costs of this appeal.

Solicitors for the Appellants : *Barrow & Rogers.*

Solicitors for the Respondent : *T. L. Wilson & Co.*

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July 25, 26, 27, 30; *Nov.* 9.

SHEIK MAHOMED AHSANULLA CHOWDHRY. . . . . } PLAINTIFF;

AND

AMARCHAND KUNDU AND OTHERS . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mahomedan Law—Wakf—Invalidity of Endowment—Dedication not bona fide.

Where it results from the provisions of a deed of gift that the same is not a *bona fide* dedication of property, but that the terms "fisabilillah wakf," &c., have been used as a veil to cover arrangements for the aggrandisement of the donor's family, and to make their property inalienable :—

Held, that the properties comprised in the deed are not thereby converted into wakf property, but are merely subjected to a charge to the extent of the charitable purposes prescribed therein.

Quaere, as to what will constitute a valid wakf, and how far provisions for the benefit of the grantor's family may be engrafted thereon.

Muzhurool Huq v. *Puhraj Dilarey Mohapattar* (13 Suth. W. R. 235), to the effect that certain provisions for the benefit of the grantor's family did not render an endowment invalid approved.

APPEAL from a decree of the High Court (May 11, 1885), reversing that of the Subordinate Judge of zillah *Chittagong* (July 26, 1883).

The subject-matter of this appeal is certain landed property lying in the district of *Chittagong*.

The Appellant and one *Sheik Mahomed Rahimulla Chowdhry*,

* *Present* :—LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

who was a Defendant in the original suit, were the only surviving sons of one *Ahmedulla Chowdhry*, who died in 1866, having executed on the 5th of December, 1864, a deed by which he purported to dedicate all his property, movable and immovable, to religious and charitable uses.

The deed purported to dedicate, beside the properties belonging to *Ahmedulla*, certain properties belonging to his son the Appellant, *Ahsanulla Chowdhry*, and standing in his name, but which were alleged by the Appellant to have belonged to his father.

Certain of the properties dealt with by the deed were attached by the Respondent in execution of a decree against *Mahomed Rahimulla Chowdhry*.

The Appellant thereupon claimed to have the attachment set aside, on the ground that the property was " wakf " under the deed, and as such was not liable to attachment and sale for the debts of *Rahimulla Chowdhry*.

The claim was dismissed on the 31st of December, 1881, by the Subordinate Judge of *Chittagong*, who, in his judgment dismissing the claim, after considering the terms of the deed and the absence of any definite direction therein as to what share of the income of the dedicated properties, which was said then to amount to Rs.17,000 annually, was to be appropriated to religious and charitable purposes, proceeded as follows :—

" The condition in which the mosque and the madrassas have been maintained does not require the bequest of properties yielding so large an income for their maintenance. I am unable to ascertain from the evidence on the record the exact amount spent annually for that purpose, but it would seem from the evidence of the claimant's witnesses that the institutions mentioned above have been kept in a miserable condition. One of the madrassas teaches about ten or fifteen boys inclusive of children belonging to the appropriator's family, the other teaches about eight or ten children. It appears to me as very probable from the aforesaid circumstances that the real object of the appropriator was neither religion nor charity, but the perpetuation of the properties in his family so that his male descendants may enjoy their profits without alienating it to strangers. That the

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appropriator had such an intention in view may also be gathered from the provision in the 5th paragraph of the deed, by which he tried to restrict even the power of the so-called mutwalis to sell or mortgage the allowances granted to them. I do not think a Mahomedan can lawfully make such a disposition of his property under the disguise of a wakf, and it appears to me that the disposition is invalid. The claim is dismissed accordingly with costs."

Thereupon the Appellant sued to set aside this order, and to have it declared that the properties were wakf.

The Subordinate Judge held, firstly, that the words " fisabilillah wakf " (translated in the judgment as " appropriation to God "), used in the deed, were " sufficient to make the properties covered by the instrument wakf properties under the Mahomedan law."

Secondly, that " this wakfnama directs that from the endowed properties are to be met the expenses of the proprietor's mosque, of his two madrassas, and of charity to the poor and to travellers, and that it also makes provision for his sons, daughters, and other descendants."

Thirdly, that this provision does not, under Mahomedan law, invalidate the document, inasmuch as the settlement of a wakf property on one's children and descendants is lawful under the Mahomedan law.

Fourthly, that the properties the subject-matter of this suit were covered by the deed.

He further held that the evidence went to shew that the income of the properties was partly appropriated to religion, partly for the maintenance of the Appellant, his brother, and some other members of his family, but that this did not invalidate the wakfnama.

He held, therefore, that the wakfnama was valid under the Mahomedan law, and that the properties it covered were in consequence inalienable.

The High Court held that, if the first clause of the deed had stood alone and unqualified, there would have been a valid dedication of the properties covered thereby, but they held that it was qualified by the succeeding clauses.

They pointed out that out of the thirteen paragraphs into

which the body of the deed was divided only one, the second, alluded to religious works, which it directed the mutwali or manager to "continue to perform according to custom."

They held that "the effect of the deed as a whole is that while it professes to dedicate as wakf properties bringing in a very large annual income it leaves it to the members of the family, who are as mutwalis to retain the control of the management, to spend as little as they like beyond *what is customary* on the objects of the endowment, and to take as much as they like for themselves and the members of the family for all time on account of salary as maintenance."

And again that it is quite clear that the "customary mode of performing them" (the stated religious works) "would involve an expenditure which in no way approached the annual income, and that there would remain a large annual surplus, which would be entirely at the disposal of the mutwalis, and from which all the members of the family would have to be maintained."

And again that "the dedication clause is subject to the subsequent provisions, and these, while giving the smallest possible prominence to the objects of the endowment and limiting . . . . the expenditure on them, would operate to create a perpetuity for the benefit of the members of the family, and at the same time place the properties beyond the reach of the law. That this was the object of the dedicator, there can, we think, from the terms of the deed, be little doubt," and they conclude this part of their judgment as follows :—"On a proper construction of the whole deed it seems to us that though all the properties are nominally made wakf for proper and legitimate objects, there is a surplus which is to be enjoyed by the members of the family, and as to which there is no ultimate trust in favour of any pious or charitable purpose."

They further held that this is not a case of a wakf in favour of the founder's children and children's children with an ultimate trust for the poor and needy, but that here the dedication purported to be for religious and charitable purposes alone, and that it was clear that it was not the intention in this case that anything like the whole income of the properties should be spent on the objects designated.

They were therefore of opinion that the settlement should only

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hold good to the extent of the intention of the donor as regards the special objects in support of which the settlement was made, and they held that there was no *bona fide* intention to create a wakf of all the properties.

They declared, therefore, that the deed construed as a whole did not create a valid and entire wakf of the properties the subject-matter of the suit, and that consequently the Appellant was not entitled to get the properties released from attachment as wakf, but that the deed did create a charge on the properties for the maintenance and support in the customary manner of the objects designated in the opening clause of the deed.

The extent, however, to which that charge was to be borne by the various properties subjected to the charge, they were of opinion that they could not deal with in this suit which concerned only a few of the properties intended to be charged.

Doyne, and *C. W. Arathoon*, for the Appellant, contended that the deed of the 5th of December, 1864, constituted a valid wakf. They cited with reference to the proper construction to be placed thereon *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (1); *Bischenchand Basawut* v. *Syed Nadir Hossein* (2). *Baillie's* Mahomedan Law, vol. i., p. 599. [SIR BARNES PEACOCK referred to *Ameer Ali's* Tagore Lectures, 1884, p. 315.] See *Doe* v. *Abdollah Barber* (3). Supposing an appropriation of part of the properties to the donor's family, does that invalidate the rest of its provisions? See Hedaya, vol. 2, bk. 15, p. 353, *Mahomed Hamidulla Khan* v. *Lotful Huq* (4); *Abdul Ganne Kasam* v. *Hussen Muja Rahimtulla* (5). [LORD HOBHOUSE referred to *Bibee Kuneez Fatima* v. *Bibee Sahiba Jan* (6). *Cowie*, Q. C., referred to *Muzhurool Huq* v. *Puhraj Ditarey Mohapattar* (7).] See also *Jewun Doss Sahoo* v. *Shah Kubeerooddeen* (8); *Wahid Ali* v. *Ashruff Hossein* (9); *Lutchmiput Singh* v. *Amir Alum* (10); *Phate Sahib Bibi* v. *Damodar Premj* (11); *Doyalchund Mullick* v. *Syud*

(1) Law. Rep. 6 Ind. Ap. 182.
(2) Law Rep. 15 Ind. Ap. 1.
(3) Fulton's Rep. pp. 345, 353.
(4) Ind L. R. 6 Calc. 744.
(5) 10 Bomb. H. C. R. 7.
(6) 8 Suth. W. R. 313.
(7) 13 Suth. W. R. 236.
(8) 2 Moore's Ind. Ap. 390.
(9) Ind. L. R. 8 Calc. 732.
(10) Ind. L. R. 9 Calc. 176.
(11) Ind. L. R. 3 Bomb. 84; Ind. L. R. 6 Bomb. 42; Ind. L. R. 10 Bomb. 119; Ind. L. R. 11 Bomb. 492, 498.

Keramut Ali (1).] [LORD HOBHOUSE :—There is no trace in these cases of the doctrine that a man's gift to his own family is itself a pious use.] The ultimate trust in favour of the poor is a pious use. There is no doubt a discretionary power to the mutwali or manager; as much as may be necessary for maintenance is to go to the family. [LORD WATSON :—There must be complete dedication to make a wakf ; the deed must not give a mere *spes successionis*.]

Cowie, Q. C., and *Branson*, for the Respondent, contended that the deed in question did not validly and effectually dedicate the said properties so as to make them wakf. From the deed itself, as well as from the evidence of how the income of the properties had been dealt with, it appeared that the whole transaction was only a device to create a perpetuity for the benefit of the family of *Ahmedulla Chowdhry*. The trusts declared did not exhaust the income from the properties. It is necessary that besides the use of the technical word "wakf" there must be a clear intention shewn to devote to religious purposes. Reference was made to *Ameer Ali's* Tagore Law Lectures, p. 230. In *Fatma Bibi* v. *Advocate General*, Ind. L. R., 6 Bomb. p. 42, *West*, J., refers to the failure of the intermediate and not the primary purposes, and therefore says exactly the contrary of what he is represented by *Ameer Ali* to say. The question arises whether the primary object of this deed was a charitable one, or whether the real purpose in view was to provide for the family, and to protect the provision so made as a wakf. Reference was made to *Khajah Hossein Ali* v. *Shahzadee Hazara Begum* (2); Hedaya, vol. ii., p. 349; *Futtoo Bibee* v. *Bhurrut Lall Bhukut* (3); Baillie, vol. i., p. 557; *Mahomed Hamidulla Khan* v. *Lotful Hug* (4).

Doyne, replied.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE :—

The Plaintiff in this suit, who is also the Appellant, is one of the sons of *Sheikh Ahsanulla Chowdhry* ; the second Defendant is

(1) 16 Suth. W. R. 116.
(2) 12 Suth. W. R. 344, 347.
(3) 10 Suth. W. R. 299.
(4) Ind. L. R. 6 Calc. 744.

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another son; the first Defendant is a judgment creditor of the second Defendant, and in that character obtained an attachment against the property now in dispute. The Plaintiff contends that the property is wakf and that he is the mutwali, and that his brother has no interest therein which can be taken in execution. He accordingly made a claim in the execution proceedings, which on the 31st of December, 1881, was rejected by the Court on the ground that no genuine wakf had been created.

The Plaintiff then brought the present suit. In his plaint he states that the properties mentioned in the schedule were owned by his father *Ahmedulla*, that *Ahmedulla*, by a wakfnama of the 5th of December, 1864, made a wakf of them, which ever since has continued in force; and that he and his brother are simply salaried servants, for the purpose of performing the work specified in the wakfnama. He prays for a declaration that the specified properties are wakf, and that the order of the 31st of December, 1881, may be set aside.

The only substantial issue throughout the litigation has been whether the intention of the deed of the 5th of December, 1864, was to turn the properties in question into wakf property. If it was, the Plaintiff is entitled to succeed; and if not, he must fail. The Subordinate Judge decided in his favour. On appeal the High Court thought that the intention of the deed was not to create an entire wakf of the properties, but only to create a charge on them for the maintenance in the customary manner of objects designated in the opening clause of the deed. They reversed the decree of the Lower Court, dismissed the suit so far as it seeks to have the properties declared wakf and released from attachment, and declared "that the said properties are subject to the charge (the extent whereof has to be hereafter determined) specified in paragraph 1 of the wakfnama dated the 5th of December, 1864, that is to say, of defraying the expenses, in the customary manner, of the brick-built musjid of *Jorip Mahomed Chowdhry* in *Paragulpore*, and of two madrassas and sadir warid (travellers) as mentioned in the said clause."

From that decree the Plaintiff appeals, and his appeal must be decided entirely by the construction put upon the deed.

At the outset of the deed the grantor adverts to his age and

his coming death, and says, "I hereby appropriate and dedicate as fisabilillah wakf, in the manner provided in the paragraphs mentioned below,"—the properties now in question and other property there described,—"for defraying the expenses of the brick-built musjid of my grandfather *Jorip Mahomed Chowdhry* at my own family dwelling house in the village of *Paragulpore*, and of the two madrassas at my own ancestral homestead, and my lodging house in the town of *Chittagong* and sadir warid (persons coming and going), and I pray to God that he may in his mercy accept and preserve the same for ever for being applied to those purpóses."

The "paragraphs mentioned below" are thirteen in number.

Paragraph 1 appoints the grantor's three sons to be mutwalis of the wakf properties in a gradation of rank, and it contains some very elaborate instructions respecting the management of the property.

Paragraph 2 runs as follows :—

"The mutwali, after payment of the proper expenses of the mosaref and the necessary costs of collections of the zemindari and the salaries of mokhtars and other servants and the expenses of litigation and the like, and all other charges which may be incurred on the occurrence of any peril or emergency, out of all kinds of income and profits of the endowed properties according to the long standing practice, shall take from the residue his own monthly allowance, pay over the allowance due to the naib mutwali and naib-ulmaniab and my daughters as specified in the schedule, and continue to perform the stated religious works according to custom. He shall, having regard to the provisions contained in the first paragraph, keep his eye to the legitimate objects of the mosaref, and not commit extravagance and waste, or practise fraud in connection therewith. The balance that may be left after meeting the above-mentioned expenses shall be kept in a proper, that is to say, a safe place, under the supervision and management of all the three persons."

The schedule provides Rs.100 per month for the first mutwali, Rs.90 for the second, Rs.80 for the third, and Rs.30 for the daughters.

Paragraph 3 provides for the succession of mutwalis in case of

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retirement or death. It is very inartificially expressed, and in some contingencies might be difficult to apply. But for its bearing on the construction of the deed it is sufficient for their Lordships to say that in their judgment it was meant by its framer to provide for a perpetual succession of some of the male members of his family as mutwalis, to be appointed either by existing mutwalis, or by a committee or by an officer of Government.

Paragraph 4 provides for the addition to the wakf of surpluses occurring under paragraph 2.

Paragraph 5 declares that the persons getting monthly allowances shall have no power to assign or charge them, and that creditors shall have no claim against them.

Paragraph 7 declares that, if "the mutwalis" have sons exceeding three in number, for those who are not mutwalis the mutwalis shall fix a monthly allowance. Those persons are to live on their own earnings in professions, trades, or service; but when any one becomes a mutwali he is to bring into the wakf all the property he has got.

Paragraph 8 provides that if "any one" dies leaving no sons his wife and daughter shall receive allowances. It then continues, "It shall be competent to the mutwalis, having regard to the income and expenditure of the wakf properties, to proportionately increase or decrease these allowances as well as their own salaries, and those of other salaried persons, and no one shall be able to raise any objections to the same."

The other paragraphs have no material bearing on the present question.

The case has been very elaborately argued at the Bar, and numerous text-books and decisions have been cited—on the Plaintiff's side to shew that a wakf may lawfully embrace provisions for the family of the grantor; and on the Defendant's side to shew that there can be no wakf unless the whole property is substantially and primarily dedicated to charitable uses.

Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a valid wakf, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character

as a charitable gift. They are not called upon by the facts of this case to decide whether a gift of property to charitable uses which is only to take effect after the failure of all the grantor's descendants is an illusory gift, a point on which there have been conflicting decisions in *India*.

On the one hand their Lordships think there is good ground for holding that provisions for the family out of the grantor's property may be consistent with the gift of it as wakf. On this point they agree with and adopt the views of the *Calcutta* High Court, stated by Mr. Justice *Kemp* in one of the cited cases (1). After stating the conclusion of the Court that the primary objects for which the lands were endowed were to support a mosque and to defray the expenses of worship and charities connected therewith, and that the benefits given to the grantor's family came after those primary objects, that learned Judge says: " We are of opinion that the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family, and which after they lapse will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan law."

On the other hand, they have not been referred to, nor can they find, any authority shewing that, according to Mahomedan law, a gift is good as a wakf unless there is a substantial dedication of the property to charitable uses at some period of time or other. Mr. *Arathoon* indeed contended that a family settlement of itself imports an ultimate gift to the poor, founding himself on a passage in the Tagore Lectures delivered in 1885 by a learned Mahomedan lawyer (2). But no authority has been adduced for that proposition. The observations of Mr. Justice *West*, which are relied on by the learned lecturer, do not go that length; and they are themselves of an extra-judicial character, as the case in which they were uttered did not raise the question. Their Lordships therefore look to see whether the property in question is in substance given to charitable uses.

The leading clause of the deed contains no charitable gift except "in the manner provided by the paragraphs mentioned

(1) 13 W. R. 235.

(2) Page 230.

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below," and we must search those paragraphs to find the real nature of the gift. Now as regards the grantor's moveable property he was advised that there would be legal difficulty if he did not then define the objects on which it was to be spent. So he expressly mentions that it is to be spent in pious and virtuous works, and it is not necessary to decide whether the terms which he uses constitute a separate absolute gift to such purposes, or are controlled by the other paragraphs. As regards the immoveables, he uses different language; and the only direction creating a trust for the objects mentioned in the opening sentence is that which is contained in the second paragraph. That trust is (after payment of "moosaref" expenses, and salaries), "to perform the stated religious works according to custom."

There is a great deal in the deed which is designed for the aggrandisement of the family property, and for keeping it perpetually in the hands of the family. The provisions for accumulation in paragraph 4; the attempt to save salaries from alienations and from creditors in paragraph 5; the provisions for appointment of male issue as mutwalis in paragraph 3, coupled with the allowances to other male issue, and to wives and daughters of such issue in paragraphs 7 and 8, all indefinite in point of duration, and, as their Lordships think, intended to be commensurate with the existence of the family; the direction in paragraph 7 that new mutwalis should bring all their private acquisitions into settlement; all these things point to the same end, the increase of property available for the family. In paragraph 8 the grantor allows increases of salaries and allowances to members of the family, so that as the property increases the family may grow richer. There is not a word said about increasing the amount spent on charitable uses beyond the expenditure which was according to custom. Their Lordships cannot find that the deed imposes any obligation on the grantor's male issue, or on any other person into whose hands the property may come, to apply it to charitable uses except to the extent to which he had himself been accustomed to perform them.

If, indeed, it were shewn that the customary uses were of such magnitude as to exhaust the income, or to absorb the bulk of it,

such a circumstance would have its weight in ascertaining the intention of the grantor. But the Court in the execution proceedings considered that the charitable outlays which he contemplated were of small amount compared with the property. The Subordinate Judge in this suit does not deal with the matter. The High Court says that the Plaintiff has carefully withheld evidence as to value, and believes that it was much more than he represented. For all that appears there is no reason to suppose that the charitable uses would absorb more than a devout and wealthy Mahomedan gentleman might find it becoming to spend in that way.

Under these circumstances, their Lordships agree with the High Court that the gift in question is not a *bona fide* dedication of the property, and that the use of the expressions "fisabilillah wakf," and similar terms in the outset of the deed, is only a veil to cover arrangements for the aggrandisement of the family and to make their property inalienable.

The result is that in their judgment this appeal should be dismissed with costs, and they will humbly advise Her Majesty to that effect.

Solicitors for the Appellant : *T. L. Wilson & Co.*

Solicitors for the Respondents : *Watkins & Lattey.*

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April 5, 9; *July* 24, 31; *Nov.* 30.

SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) . . . . . } APPELLANT;

AND

SRIMATI FAHAMIDUNNISSA BEGUM AND OTHERS (PLAINTIFFS) AND SHAMACHURN GANGOOLI (DEFENDANT) . . } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Act IX of 1847—*Lands Reformed on the Site of Permanently Settled Estate—Non-liability to Assessment—Jurisdiction of Civil Court to review decision of Board of Revenue.*

Although by the legislation prior to 1847 it was intended to bring under assessment lands not included in the permanent settlement, whether they were waste or gained by alluvion or dereliction, yet all such lands as were comprised in permanently settled estates were to be rigorously excluded from further assessment. Lands so comprised which had become covered with water and afterwards reformed were not lands "gained from the river or sea by alluvion or dereliction" within the meaning of the said legislation, which was confined to lands so gained "since the period of the settlement."

The intention and effect of Act IX of 1847 were merely to change the mode of assessment, not to extend in any way the liability to assessment, so as to include in such liability land reformed on the site of a permanently settled estate, the revenue of which had been paid without abatement since the permanent settlement :—

Held, further, that where the Board of Revenue has subjected land included in the permanent settlement to an additional assessment, purporting to act therein under Act IX of 1847, the Civil Court has jurisdiction to review such decision and to declare the act of the Board *ultra vires*.

APPEAL from a decree of the High Court (Aug. 14, 1886), which decree was based upon the judgment of a majority of the Judges constituting a full bench of the Court.

The case was twice argued before their Lordships.

The Plaintiffs in the suit were proprietors, either as zemindars or putnidars, of all but a four gunda share, of a one-fifth divided

* *Present* :—LORD WATSON, LORD HOBHOUSE, LORD HERSCHELL, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH. Upon the first argument there were present LORDS HOBHOUSE and MACNAGHTEN, and SIR RICHARD COUCH.

share, of a zemindari called *Kartikpore Sujabad*, in the district of *Faridpore*. One of the mouzahs falling exclusively within the Plaintiff's share, called *Mohun Sureswar*, is the subject of this appeal.

The remaining four gunda share belonged to the second Defendant, *Shama Churn Gangooli*, who did not join in the suit with his co-proprietors, and was therefore made a Defendant.

In the year 1792, when the partition of the zemindari into five shares was made by a Government officer, Mr. *Thompson*, Mouzah *Mohun Sureswar*, as appeared by his proceedings, contained an area of 10,042 bighas of land. On that area, Government revenue was assessed, under the permanent settlement, and continued since to be paid, without any deduction on account of loss of area by diluviation ; and consequently the proprietors and their heirs and successors were entitled under the declaration contained in the 4th section of Regulation I of 1793, to hold Mouzah *Mohun Sureswar*, at that assessment, for ever.

Mouzah *Mohun Sureswar*, as well as other low-lying parts of the zemindari, was exposed to the action of various branches of the *Ganges* and *Brahmaputra*, which have their confluence in that district. Consequently the mouzah at times lost largely. Prior to 1838 the emergent area was said to have been reduced to little more than one half. Resumption proceedings having been instituted under Regulation II of 1819, with regard to the latter area, it was, by order of the Commissioner, dated the 27th of April, 1838, released to the then proprietors of the mouzah.

That order was not produced, but, according to the Plaintiffs, had been made in accordance with the preamble, and the 3rd, 7th, 20th and other sections, of that regulation, on the ground that the mouzah was included in the Decennial Settlement, and that the lands then in question formed part of the permanently settled lands.

After that date, further diluviation or submergence of that area took place, so that in 1859, when the *Thakbust* survey, *i.e.* the survey preliminary to the regular survey, made by native government surveyors, was made, only 652 bighas of the mouzah appeared above water ; and when the regular survey was made a short time afterwards, that residuum had disappeared.

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After this, part of the lands of the mouzah again appeared above water, and gradually, by or before the year 1877, increased to about 2000 bighas.

In the meantime Act IX of 1847 was passed.

Under the provisions of this Act, a survey of, with other lands, Mouzah *Mohun Sureswar*, took place in 1877, and the "*Dearah* Survey Map" was made as the result; which shewed the lands in suit, which, along with others, represented what then remained of *Mohun Sureswar*, less than a half. The rest apparently lay to the north, submerged by the River *Pudda*.

This whole area appeared from the judgment of the Deputy Collector of the *Dearah* Survey, dated the 3rd of February, 1879, to have been surveyed and mapped, in the first instance, as "surplus accretions to" two other neighbouring mouzahs, both shewn on the map immediately to the west of the lands in suit.

The Plaintiffs claimed those lands, as re-formation of their permanently settled estate of *Mohun Sureswar*.

The Deputy Collector was of opinion that the evidence adduced was not sufficient to prove such re-formation, and that the survey map should be followed. That is, proceeding on an assumption of fact and title since found to be erroneous, he treated the whole of the emergent land as belonging to those other mouzahs, and therefore liable to assessment as an addition to the permanently settled areas of those mouzahs.

The Plaintiffs appealed to the Commissioner of *Dacca*, who allowed the appeal as to part, and rejected it as to the rest. So far as he allowed the appeal it was because the *Thakbust* map of 1859 shewed the Plaintiffs in possession of those lands as *Mohun Sureswar*. The remaining lands he directed to be assessed with the parties in possession, as accretion of neighbouring mouzahs, being of opinion that there was "nothing to shew that these were really on the site of the permanently settled estate." And the Commissioner was also influenced by the consideration, that, if the Plaintiffs had lost lands of *Mohun Sureswar*, they had gained elsewhere, by the increase of a village called *Dotul-libusti*, to the south-east of the disputed lands.

The Plaintiffs appealed to the Board of Revenue at *Calcutta*.

On the 19th of April, 1881, that appeal was rejected, on the

ground that the Plaintiffs had failed to satisfy the board that the triangular piece of land, the subject of the appeal, "existed at the time of the permanent settlement," while, on the contrary, it had "certainly accreted since the last previous survey," and should therefore be assessed.

The suit out of which this appeal arose was instituted on the 10th of April, 1882, to obtain a declaration of the Plaintiffs' right to the lands in suit, as part of *Mohun Sureswar*.

The Subordinate Judge, on the 21st of March, 1883, decided in favour of the Plaintiffs. He held that "there can be no question that the identification had been placed beyond reasonable doubt."

The District Judge held on the 28th of November, 1884, that the revenue authorities, having assessed the lands in suit, under the provisions of Act IX of 1847, it was not competent to the Civil Courts to interfere with them, as it was a question of assessment only, and the Plaintiffs' title to the lands, and to a settlement of those lands, was not in question, as they were "undoubtedly an accretion to *Chur Mohun Sureswar*." He referred on the question of jurisdiction to *Dewan Ramjewan Singh* v. *Collector of Shahabad* (1).

The High Court reviewed by their judgment of the 2nd of March, 1886, the Regulation Law bearing on the question, and the decisions on that law, of which some were conflicting, and having stated their own opinion to be that the Civil Courts were competent to try whether the revenue authorities have in any case acted within their jurisdiction, and that, in this case, they had acted *ultra vires*, referred to a full bench, the two following questions :—

"1st. Whether the provisions of Act IX of 1847 are applicable to land reformed on the site of a permanently settled estate, the revenue of which estate has been paid without abatement since the permanent settlement."

"2nd. Whether, if these provisions are not so applicable, a Civil Court should, in the exercise of its discretion, make a decree declaring that the proceedings of the revenue authorities in respect of such land are *ultra vires*."

(1) 14 Beng. L. R. 221.

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On the 14th of August, 1886, the judgments of the full bench were delivered.

The dissentient Judge, Mr. Justice *Romesh Chunder Mitter*, held, as to the first question referred, that the provisions of Act IX of 1847, did not apply to lands which, as in this case, had re-formed on the old site. And, on the second question, that the jurisdiction of the Civil Courts had been taken away by the 6th section of Act IX of 1847, and that the sole right to investigate into and decide questions as to the assessment of lands, lay with the revenue authorities, who, notwithstanding the language of the 1st section of that Act, retained the judicial functions given to them by Regulation II of 1819, and were not conclusively bound by the survey maps directed to be made by Act IX of 1847. The principal reason given by the learned Judge, for his conclusion was, that a Collector or other officer, deciding questions of liability to assessment, was not a "tribunal."

Mr. Justice *Wilson* delivered the judgment of the other judges.

The purport of that judgment was, that according to the substantive law, any land, alluvial or otherwise, "included in a permanently settled estate, was not liable to further assessment; any land not so included was liable to assessment." That the jurisdiction to decide the question of the liability of lands to assessment, which the revenue authorities possessed before the passing of Act IX of 1847, was taken from them by that Act. And that though in the matter of lands undoubtedly liable to assessment, their assessment of them was final, the Civil Courts were competent, in case of disputed liability, to try whether any such liability existed.

Robinson, Q. C., and *Branson*, for the Appellant, contended that the case was governed by Act IX of 1847, and that according to the true construction of that Act the Civil Courts had no jurisdiction to entertain this suit. The order of the *Sudder* Board of Revenue of the 19th of April, 1881, was a final order. It could not be questioned in any suit. So long as the order remained the lands were liable to pay revenue. Under sect. 6 of the Act, they were rendered liable to be assessed; and the assessment

once made is final and cannot be questioned in a Civil Court. Reference was made to the earlier Regulations. Those of 1793, 1812, and 1817, were swept away by Regulation II of 1819 which was followed by Regulations VII of 1822 and IX of 1825. There is no regulation which gives the zemindar a right to come into Court and complain of being assessed out of his property. Reference was made to *Dewan Ramjewan Singh* v. *Collector of Shahabad* (1); *Collector of Moorshadabad* v. *Rai Dhunput Singh* (2); *Narain Chunder* v. *Tayler and others* (3); *Sarutsundari Debi* v. *Secretary of State for India* (4); *Wise* v. *Ameerunnissa Khatoon* (5); *Mussumat Budrunnissa Chowdhrain* v. *Prosunno Kumar Bose* (6). There was no power till the Act of 1847 for the zemindar to get the revenue taken off if the land was swept away. The Government, however, could demand an increased assessment if the land had increased.

Cowie, Q. C., and *Doyne*, for the Respondents, contended that the exclusive jurisdiction of the revenue authorities under Act IX of 1847, to assess lands relates to lands not included in a permanently settled estate. When a contest arises as to whether the lands proposed to be assessed are so included or not, the Civil Courts alone can decide it and have jurisdiction so to do. By Act IX of 1847, assessment must be under that Act. Sect. 5 provided for proportionate reduction of rent where it should appear that land had been lost by a revenue paying estate. Sect. 6 provided that where land had been added thereto, it should by assessed according to the rules in force for assessing alluvial increments, by the local authorities who should report to the *Sudder* Board of Revenue, whose orders should be final. Act IX of 1847 suspended the further operation of Regulations II of 1819 and III of 1828, which established tribunals and prescribed rules of procedure for investigations regarding the liability of lands gained from rivers. But the new Act did not substitute any tribunal or rules of procedure for trying any contested question of the liability of alluvial formations to assess-

(1) 14 Beng. L. R. 221; S. C. 19 Suth. W. R. 127.
(2) 15 Beng. L. R. 49.
(3) Ind. L. R. 4 Calc. 103.
(4) Ind. L. R. 11 Calc. 784.
(5) Law Rep. 7 Ind. App. 73.
(6) 6 Beng. L. R. 267.

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ment. It did not even enact that persons interested should have an opportunity of objecting to or rectifying the survey maps of their alluvial lands which should be made from time to time. No machinery was given to the Revenue Courts to investigate and decide title, nor was any appeal given. The object of the Act was to provide a new mode of assessing lands; it did not impose any new liability to assessment which remained as prescribed by the existing law.

The lands in question were not gained from rivers, and were, therefore, outside the scope of Act IX of 1847 : *Lopez* v. *Muddun Mohun Thakoor* (1).

Robinson, Q.C., replied.

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Nov. 30.

The judgment of their Lordships was delivered by

LORD HERSCHELL :—

Two questions arise in this case. They were stated in the reference to the Full Bench by the Divisional Bench of the High Court in the following terms :—

1st. Whether the provisions of Act IX of 1847 are applicable to land reformed on the site of a permanently settled estate, the revenue of which estate has been paid without abatement since the permanent settlement ?

2nd. Whether, if these provisions are not so applicable, a Civil Court should, in the exercise of its discretion, make a decree declaring that the proceedings of the revenue authorities in respect of such land are *ultra vires* ?

In their Lordships' opinion the second question which arises should be stated somewhat differently, viz., Whether if these provisions are not so applicable, a Civil Court has jurisdiction to review the decision of the Board of Revenue, and to declare that the proceedings of the revenue authorities in assessing such land were *ultra vires* ?

The distinction is not material in the present case, but it appears to their Lordships that if the Civil Court has jurisdiction at all, that jurisdiction may be invoked as a matter of

(1) 13 Moore's Ind. Ap. Ca. 467.

right, and that it is not a case for the exercise of the Court's discretion. If the party appealing to the civil tribunal can establish that the Court has jurisdiction, and that the Board have acted *ultra vires*, he is, in their Lordships' opinion, entitled as of right to a decree.

Both the questions involved in this case, depend upon the construction to be put upon the Act of 1847. The 1st section of that Act enacts "that such parts of the Regulations of the *Bengal Code* as establish tribunals, and prescribe rules of procedure for investigations regarding liability to assessment of lands gained from the sea, or from rivers by alluvion or dereliction, or regarding the right of the Government to the ownership thereof, shall, from the date of the passing of this Act, cease to have effect within the provinces of *Bengal*, *Behar*, and *Orissa*, and that all such investigations pending before the Collectors and Deputy Collectors in the said provinces at the said date shall be forthwith discontinued; and that no measures shall hereafter be taken for the assessment of such lands, or for the assertion of the right of the Government to the ownership thereof, except under the provisions of this Act."

The terms of this enactment make it clear that its intention and effect were merely to alter the machinery by which lands gained from the sea or rivers by alluvion or dereliction were to be assessed, and not to subject to assessment any lands which would not have been liable thereto under the law in force at the time the Act was passed. It is therefore essential to a right interpretation of the enactment to examine carefully the state of the law at that time, and to see what lands were then liable to assessment, and whether the prior legislation throws any light upon the meaning of the words "lands gained from the sea or from rivers by alluvion or dereliction."

By clause 3 of Regulation I of 1793, by which the decennial settlement was made permanent, it was declared to the proprietors that they and their successors would be allowed to hold their estates at such assessment for ever.

Regulation II of 1819 defines the right of the Government to the revenue of lands not included within the limits of estates for which a settlement had been made, and provides a machinery for

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their assessment. Clause 1 renounces all claim on the part of the Government to additional revenue from lands included within the limits of estates for which a permanent settlement had been concluded. Clause 3, after declaring and enacting that lands which were not included within the limits of estates for which a settlement had been concluded were to be liable to assessment, provides that the foregoing provisions were to be deemed applicable "to all lands gained by alluvion or dereliction since the period of the settlement whether from an introcession of the sea, an alteration in the course of rivers, or the gradual accession of soil on their banks." It then provides the mode of investigation in relation to the liability of lands to be assessed. It is not necessary for the present purpose to enter into the details of the machinery provided for, it is enough to say that the Collector is to make a judicial inquiry after full notice to the party interested taking evidence upon oath, and examining the documents presented. After the Collector has notified his decision to the party concerned, the Board of Revenue are, upon a day to be fixed by public notice, and after hearing anything which the party may have to urge on his own behalf, to proceed to pass judgment in the case. If the Board of Revenue decide against the assessment, their decision is to be final, except on proof of fraud or collusion, but if the board declare the lands liable to assessment, the party may institute a suit in the Civil Court to try the justness of the demand. It may be further noticed that, by clause 7 of the Regulation, in cases where land is supposed to be liable to assessment under the provisions of clause 3, the Collector is to institute a full and particular inquiry into the circumstances and condition of the land in question at the period of the decennial settlement, and in cases of alluvion land into the period of its formation. The 31st clause appears to their Lordships to be also very important. After providing that nothing in the Regulation should be considered to affect the rights of proprietors of estates for which a permanent settlement had been concluded, to the full benefit of waste lands included within the boundaries of the estate which may have been since reduced into cultivation, it proceeds :—"The exclusive advantages resulting from the improvement of all such lands were guaranteed to the proprietors by the

conditions of that settlement, and it being left to the Courts of Judicature to decide on all contested cases whether lands assessed under the provisions of this Regulation were included at the period of the decennial settlement within the limits of estates for which a settlement has been concluded in perpetuity, and to reverse the decision of the Revenue authorities in any case in which it shall appear that lands which actually formed at the period in question a component part of such an estate have been unjustly subjected to assessment under the provisions of this Regulation, the zemindars and other proprietors of land will be enabled, by an application to the Court, to obtain immediate redress in any case in which the Revenue authorities shall violate or encroach on the rights secured to them by the permanent settlement."

The next enactment is perhaps even more important. "It is further hereby declared and enacted that all claims by the Revenue authorities on behalf of Government to additional revenue from lands which were, at the period of the decennial settlement, included within the limits of estates for which a permanent settlement has been concluded, whether on the plea of error or fraud or any pretext whatever, saving of course lands expressly excluded from the operation of the settlement, shall be considered wholly illegal and invalid."

It is only necessary to notice in addition Regulation III of 1828. That Regulation recited that, partly from the number of revenue cases, and partly from the practice of the Courts in treating the appeals made to them as original suits, little or no progress had been made towards the settlement of the matter, and heavy arrears of such cases had accumulated. It accordingly provided for the appointment of Special Commissioners, to whom were entrusted the powers of the Court, all appeals to the ordinary Courts being abrogated in those districts in which such Commissioners had been appointed. So far the regulation only altered the tribunal; it made no substantive change in the law. And inasmuch as no Special Commissioner now exists having authority in the district in which the lands in question are situate, the provisions relating to these Special Commissioners may be disregarded. The regulation, however, modified in some respects the provisions of Regulation II of 1819. It enacted

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that decisions of the Boards of Revenue declaring the liability to assessment of lands should be carried into immediate execution, notwithstanding that the parties against whom the decisions had passed had sued to contest the decision in one of the established courts of justice. It further provided that all suits which might be instituted in the established courts of justice under the provisions of Regulation II of 1819 to contest decisions of the Board of Revenue should be heard and determined in the same manner as regular appeals, and no further pleadings should be required or received than the objections of the Appellant to the decision of the Board, and the reply to these objections on the part of the Revenue authorities, and that it should not be competent to the Courts to take further evidence, oral or documentary, unless it should appear that such evidence was tendered by the party adducing it to the collector or the board, and was then rejected on insufficient grounds, or that such evidence was essential to the ascertainment of some fact material to the issue not fully inquired into in the course of the previous investigation. It will be observed that these modifications of the law of 1819 only affect the procedure in cases of appeal to the ordinary civil tribunals of the country. They do not touch the right of appeal to such tribunals or alter any of the rights previously assured to the owners of permanently settled lands.

This review of the legislation prior to 1847 makes it, in their Lordships' opinion, clear that, whilst it was intended to bring under assessment lands not included in a permanent settlement, whether they were waste or gained by alluvion or dereliction, all such lands as were comprised in permanently settled estates were to be rigorously excluded from further assessment. And in addition to this, the proprietors of such estates were assured that they could protect themselves against any action of the Revenue authorities which would tend to infringe upon their rights by appeal to the Civil Court. Their Lordships think it equally clear that lands within the limits of settled estates which had become covered with water, and afterwards reformed, were not lands "gained from the river or sea by alluvion or dereliction" within the meaning of this legislation, which is confined to lands so gained "since the period of the settlement."

Returning now to the Act of 1847, it appears to their Lordships, as has been already observed, that its purpose was merely to change the mode of assessment in the case of a class of land already liable to be assessed under existing legislation, viz., land gained by alluvion or dereliction which was not included within the limits of a permanently settled estate. The terms of the 1st section pointed to this and nothing more, and the details of the legislation support the same conclusion. It is only to lands "gained" from the sea or river by alluvion or dereliction that the legislation is applicable. Their Lordships have shewn from an examination of the previous legislation the construction which must be put upon these words, that they must be limited to lands gained since the period of the settlement. It is only in relation to these lands, therefore, that the previous enactments are to cease to have effect. The 3rd section empowers the Government of *Bengal* in any district in which a survey has been completed and approved by the Government to direct decennially a new survey of lands on the banks of rivers and on the shores of the sea, in order to ascertain the changes that may have taken place since the last previous survey, and to cause new maps to be made according to such new survey. Sect. 6 provides that "whenever, on inspection of any such new map, it shall appear to the local revenue authorities that land has been added to any estate paying revenue directly to Government, they shall without delay duly assess the same according to the rules in force for assessing alluvial increments."

Their Lordships cannot think that it was intended by such a provision as this to deal with the case of lands in permanent settlement which had become derelict of the sea or a river. They cannot be said to have been "added" to the estate to which they already belonged. Considering the solemn assurance given by the Government to the owners of permanently settled estates that they should not be liable to further assessment in respect thereof, their Lordships find it impossible to hold that it was ever intended by this enactment to subject them to an added assessment in respect of land for which they were already assessed because they had had the misfortune to be practically deprived of it for a time by an incursion of the sea or river.

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And no violence is done to the language of the enactment by rejecting a construction which leads to such a conclusion. On the contrary, it would be straining the language unnaturally to include such a case as that with which their Lordships are dealing. If, indeed, such legislation as is contained in the preceding sect. 5 had been in force from the outset, so that as soon as land had been washed away from a permanently settled estate there had been a proportionate reduction of the revenue payable to the Government, it would not have been unreasonable to regard the land when again free from water as land "added" to the estate, and to assess it accordingly. And it may be that when the new map shews that land has been washed away from a settled estate since the previous survey, a proportionate abatement ought to be made under the Act of 1847. Upon this it is unnecessary to pronounce an opinion. It is clear that the Act provides no machinery for making such abatement where the land was covered with water at the time of the original survey. It is only "when on inspection of the new map" it appears that land has been washed away that there is any legislative authority for making an abatement.

Their Lordships arrive, then, at the conclusion that the first question propounded by the Divisional Bench of the High Court ought to be answered, as all the judges have answered it, in the negative.

But then it is said that the local revenue authorities having assessed the land, and the Board of Revenue having made an order confirming their action, such order is, by the very terms of sect. 6, made final, and that there is an express provision in sect. 9 that no action in any court of justice shall lie against the Government or any of its officers on account of anything done in good faith in the exercise of the powers conferred by this Act. Their Lordships cannot conceive that it was intended by these enactments to deprive the owner of a permanently settled estate of the protection assured to him by the Regulation of 1819. When once the conclusion has been reached that the provisions of the Act of 1847 are inapplicable to the case of reformed land being part of a settled estate in respect of which the full assessment has continued to be paid, it appears to follow that neither

the local revenue authorities nor the Board of Revenue can effectually render such land liable to assessment. It has been shewn that under the previous legislation the owner of such lands was expressly given an appeal to the Civil Court as a protection against any attempt of the revenue authorities to subject him to additional assessment. The provisions contained in clause 31 of the Regulation of 1819 are in no way repealed or affected by the Act of 1847. The action of the revenue authorities was, therefore, in their Lordships' opinion, wholly illegal and invalid. Their Lordships cannot hold that the Board of Revenue can, by purporting to exercise a jurisdiction which they did not possess, make their order upon such a matter final, and exempt themselves from the control of the Civil Court. It is argued that where the acts done were within the powers conferred by the Act of 1847 the protection afforded by sect. 9 would be unnecessary, and that it must be applicable to acts done in assumed exercise of the powers conferred but really in excess of them. But full effect can be given to this section without holding that it deprives the owner of a permanently settled estate of that right of appeal which is given to him in order that he may have determined in a Civil Court "the justness of the demand" of the revenue authorities.

The case, as it appears to their Lordships, may be shortly put thus. The Board of Revenue have, in violation of the right solemnly secured to the owner of a permanently settled estate, claimed to subject his land to an additional assessment, a claim which has been declared by legislation to be wholly illegal and invalid. Thereupon the owner exercises the right conferred upon him by the Regulation of 1819, and appeals by suit to the Court of Judicature to reverse the decision of the revenue authorities. In bar of this suit the answer set up is, that a subsequent law empowers the revenue authorities to assess, by new machinery, lands of a description within which the land in question does not fall, and makes the orders of the Board of Revenue thereupon final. Their Lordships are at a loss to see how this can be any answer. If it had been intended to take away from the proprietors of estates the power, by application to the Courts, to obtain immediate redress in any case in which "the revenue

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authorities shall violate or encroach on the rights secured to them by the permanent settlement," it would have been done in express terms, and not by such enactments as are contained in the Act of 1847. It seems to their Lordships that it would be an erroneous interpretation of that statute to hold that it rendered the Board of Revenue supreme, and enabled them to make valid and effectual a proceeding on their part which the law had declared to be wholly illegal and invalid.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The Appellant must pay the costs of the appeal.

Solicitor for Appellant : *Solicitor to the India Office.*
Solicitors for Plaintiff Respondents : *Barrow & Rogers.*

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Nov. 6.

BABU RAM SINGH AND ANOTHER . . . PLAINTIFFS;

AND

THE DEPUTY COMMISSIONER OF BARA BANKI . . . . . DEFENDANT.

ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.

Oudh Estates Act, 1869—*Absolute Title under Sanad.*

Held, that a sanad granted in conformity with Act I of 1869, conferred an absolute title on the grantee *prima facie*; and that the Plaintiffs had failed to establish that he had by his conduct granted to them interests in derogation of his title.

In a suit for declaration of proprietary right with a view to obtain mutation of names, *held*, that mere possession of villages subject to paying to the talookdar a proportionate share of Government revenue is insufficient to establish proprietary right; and as the plaint did not disclose either a case of adverse possession or of sub-proprietary right, those claims being irrelevant to the relief prayed could not be entertained in appeal.

APPEAL from a decree of the Judicial Commissioner (April 5, 1886), affirming a decree of the District Judge of *Lucknow* (Nov. 30, 1885), dismissing the Appellants' suit.

By their plaint the Appellants alleged that thirty-four years

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previously one *Raja Sahajram Baksh* gave certain villages to the father of the Appellants, and that from that time the Appellants' father, and after his death the Appellants, had held possession thereof, with all proprietary rights, the Government revenue having been paid in the name of the head of the family to which the Appellants and the minor, represented by the Respondent, belonged. The Appellants further alleged that, on an application by them for mutation of names, the Deputy Commissioner, on the 20th of May, 1882, refused to make an order until the Appellants had obtained a declaratory decree, and that the cause of action accrued on that date, and that on the Defendant being served with notice of the Appellants' intention to institute a suit, he in writing, dated the 5th of March, 1885, did not admit the Appellants' claim.

Branson, for the Appellants.

Robinson, Q. C., and *Macrae*, for the Respondent.

The judgment of their Lordships was delivered by

LORD HOBHOUSE :—

The villages which are the subject of this suit are part of the Defendant's talook, and are included in the sanad under which he holds that talook. The Plaintiffs claim to be proprietors of the villages by virtue of a deed of gift, which was dated in the year 1850, and of possession taken under that deed, and continued up to the present time. The deed of gift was made by the son of the then rajah, or talookdar, who was the manager of the estate, and made to the brother of the then talookdar, who is the father of the Plaintiffs. The genuineness of the deed is disputed ; but it has been held to be genuine by the Judicial Commissioner ; and for the purposes of the present appeal the correctness of that holding may be assumed. But there is no doubt that the deed of gift (whether it is an absolute gift, or one for maintenance only, is a matter of dispute) was displaced by Lord *Canning's* proclamation ; and that sanad of the taluk conferred an absolute title upon the grantee *prima facie*.

The Plaintiffs base their claim upon the principle of those

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decisions of this committee in which it has been held that the conduct of the holder of a sanad has been sufficient to establish against him a liability to make good, out of his sanad, interests in the property which he has by that conduct either granted to other people, or given them ground to claim. But the Plaintiffs do not shew that there has been any such conduct beyond the fact that they have been left in possession of the property during the whole time of the troubles in *Oudh*, and down to the present time.

The talookdar has paid to the Government the revenue for the whole talook, and the Plaintiffs have paid the talookdar that share of the revenue which would be payable for the villages that they hold.

They are now desirous of selling or mortgaging the property. They have attempted to do so, and they have failed because they cannot get a mutation of names; and the present suit is a declaratory suit, in which they seek a declaration that they are the proprietors of the property in order that they may obtain a mutation of names.

Their Lordships are of opinion that the mere fact of possession, which is consistent with an intention to give maintenance as well as proprietorship, does not establish any case against the talookdar obliging him to make the Plaintiffs proprietors of that portion of his talook.

Other cases are now set up. One is that the Plaintiffs have a good title by adverse possession. Possession may be adverse or not, according to circumstances; and the question of adverse or non-adverse possession is mainly a question of fact. But there has been no allegation of adverse possession in the plaint, and no issue raised as to it before the Courts below. Their Lordships think that it is impossible now to suggest a case of adverse possession.

Then the Plaintiffs claim that, if they are not proprietors, they have at all events a sub-proprietary right; and there are cases in which it would be quite just and proper to allow one who comes to claim recovery of villages, or the right to a settlement in villages, on the ground of a proprietary right, to maintain upon the same facts that he is in effect a sub-proprietor; but

this is not such a case. The question of sub-proprietary right is entirely irrelevant to the relief claimed in this suit, which is for a declaration of right on which to found a mutation of names in order that effect may be given to the dealings with the estate by the Plaintiffs.

Their Lordships, thinking that the suit fails upon the main point, hold that it also fails upon the other points; and the result will be that they will humbly advise Her Majesty that the Appeal should be dismissed with costs.

Solicitors for Appellants : *Watkins & Lattey.*
Solicitor for Respondent : *Solicitor, India Office.*

LALA GOWRI SUNKER LAL AND OTHERS. DEFENDANTS ;

AND

JANKI PERSHAD AND OTHERS . . . . PLAINTIFFS.

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Nov. 21, 22 ; *Dec.* 11.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Sale of Land for Arrears of Revenue—Act XI of 1859, *ss.* 18, 33—*Collector's Order of Exemption—Power of Civil Court to annul Sale.*

Held, that a Collector's order, under sect. 28 of Act XI of 1859, for exempting an estate from sale for arrears of revenue must be an absolute order of exemption, and not an order conditional upon something being done or some payment being made.

Under sect. 33 a sale cannot be annulled by a Civil Court as having been made contrary to the Act, unless upon a ground previously taken by the Plaintiffs in an appeal from the Collector to the Commissioner.

APPEAL from a decree of the High Court (June 28, 1887) reversing a decree of the Subordinate Judge of *Zillah Chupra* (March 9, 1886).

The High Court decreed that the sale of the Respondents' zemindari property called *Dumaria* should be set aside. It had been effected by the Collector of *Sarun* under Act XI of 1859 for arrears of revenue.

**Present* :—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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The Secretary of State for *India* in Council was a party defendant to the suit, but not joining in the appeal was added as a respondent.

The facts are stated in the judgment of their Lordships.

Doyne, and *C. W. Arathoon*, for the Appellants, contended that the special order of the Collector, "accept on payment of all Government demands," even if proved to have been made, had not the effect of exempting the estates from sale under Act XI of 1859. Nor had the general order of the 24th of September that effect, as has been held by both Courts. There was a subsisting arrear of revenue for which the estate was liable to be sold; and there was no legal obligation on the Collector to postpone the sale or to accept payment after sunset of the last day on which payment was due. Consequently the sale was regular, and the Plaintiffs were bound by it.

None of the Respondents appeared.

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Dec. 11.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

The Appellants were Defendants in a suit to set aside a sale of an estate or mehal called *Dumaria*, for arrears of revenue due from the Plaintiffs, made by the Collector of *Sarun* under the provisions of Act XI of 1859. The Lower Court dismissed the suit, but the High Court of *Bengal* reversed its decree, and ordered the sale to be set aside, and that the Plaintiffs should recover possession of the estate.

On the 13th of August, 1883, Rs.8. 13*a*. 5*p*. of Government revenue due on the 7th of June, 1883, being unpaid, a notification was issued by the Collector of *Sarun* that the estate would be publicly sold on Monday the 24th of September, and was duly published. On the 24th of September the Collector made an order in these terms: "Payments of revenue in arrear will be received in the Treasury up to the time of sale. Applications for exemption on the ground of payment will be received up to 1.30 P.M., but they must be supported by Treasury receipts for payment in full of all demands. No applications will be received and no payments will be accepted, after the sale has commenced."

On the 22nd of September *Bindeswari Pershad Singh*, one of the Respondents, presented a petition to the Collector, stating that in mehal *Dumaria* there was an arrear of Rs.8. 13*a*. 5*p*., in consequence of default in payment of revenue made by the other shareholders, and that he had brought the amount of arrears, and praying that it might be received and entered in the account and the mehal released from sale. On the back of this petition, there is a written order, dated the 24th of September, that the office report be submitted, and after entries of the office reports there are the following :—

"Receipt not produced before sale.

"C. C. QUINN.

"The 25th September, 1883."

"Accept on payment of all Government demands.

"*R. C. P., Sarun* Collectorate.

"The —— September, 1883."

In the Lower Court, and in the High Court, the last entry is spoken of as made on the 22nd of September, 1883. It does not appear for what reason. Mr. *Quinn* was the Collector. It is not known who was the person who used the initials *R. C. P.*, but no issue was raised in the suit as to the authority to make that entry, and that cannot now be disputed.

In the judgment of the Lower Court it is found that the payment was not made before 1.30 P.M. on the 25th of September, to which day the sale of *Dumaria* and a number of other estates in arrear had been duly adjourned by the Collector, and at the time of the sale no Treasury receipt was produced. The payment was made at the Collector's office some time before 2 P.M. on the 25th and before the commencement of the sale, but after the officers had left the office and gone to the Collector's ijlas (bench) to attend it.

Thus the order of the 24th of September, called the general order, under which an exemption might have been granted, was found not to have been complied with, and the Plaintiffs were obliged to rely upon what is called in the issues the special order, dated the 22nd of September. The Lower Court held that this is not an order for exemption under sect. 18 of Act XI

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of 1859. The High Court has held that it is. That Court says the effect of the order may be expressed as follows: "I exempt this estate from sale, provided the arrears are paid before sale." It appears to their Lordships that what is called the special order is not such an order as is intended by sect. 18. It should be an absolute exemption, not an order which may have effect as an exemption or not according to what may happen or be done afterwards. The section says it shall be competent to the Collector or other officer, at any time before the sale, to exempt the estate from sale. The Collector is to record in a proceeding the reason for granting exemption. Although this, as the High Court says, may be done at any time, the reason should exist at the time the exemption is granted, and not be a fact which may happen afterwards, or an act which may or may not be performed. The words "accepted, &c.," have been called by the Lower Courts an order, and considered as one, but it may be doubted whether they are more than a note by one of the Collector's officers that the Rs.8 13*a*. 5*p*. would be received, and therefore the mehal would be released from sale.

There is another, and, their Lordships think, a fatal objection to the decree of the High Court. Sect. 25 makes it lawful for the Commissioner of Revenue to receive an appeal against any sale made under the Act, if preferred within a specified time, and gives him power to annul any sale made under the Act which shall appear to him not to have been conducted according to its provisions. Sect. 26 gives power to the Commissioner, on the ground of hardship or injustice, to suspend the passing of final orders in any case of appeal from a sale, and to represent the case to the Board of Revenue, who, if they see cause, may recommend the Local Government to annul the sale, and the Local Government may do so, and cause the estate to be returned to the proprietor on such conditions as may appear equitable and proper. And sect. 33 enacts that no sale shall be annulled by a Court of Justice upon the ground of its having been made contrary to the provisions of the Act, unless the ground shall have been declared and specified in an appeal made to the Commissioner. The Plaintiffs appealed to the Commissioner. In their grounds of appeal they say the Collector, on the 24th of Sep-

tember, passed a general order, and they complied with it. They do not mention any order of the 22nd of September. The Subordinate Judge thought paragraph 1 of the memorandum of appeal was sufficient, but it is not. It only says the sale is fit to be set aside for reasons detailed in the following paragraphs. If the case now set up had been stated in those paragraphs, the Commissioner would have inquired into it, and if he thought there was hardship or injustice might have represented the case to the Board of Revenue. The second issue, as summarized by the Subordinate Judge is, "Does sect. 33 of XI of 1859 bar the suit ?" and upon his opinion of paragraph 1 he held that it did not bar the suit. In the judgment of the High Court this issue is not noticed. It is said that the two points upon which the parties went to trial were—1st. Was the amount due for arrears paid before the sale commenced ? 2nd. What was the meaning and legal effect of the orders of the 22nd of September and 24th of September ? This is a misapprehension. The issue upon sect. 33 was tried by the Subordinate Judge. It was decided against the Defendants ; but the decree being entirely in their favour it was not necessary for them to file a notice of objection under sect. 561 of the Code of Procedure. They could support the decree on the ground that the second issue ought to have been decided in their favour. The High Court ought to have decided that issue, or have shewn in their judgment a reason for not doing so. If it had been decided that the suit was barred by sect. 33, the appeal to the High Court ought to have been dismissed.

Upon both the grounds which have been considered their Lordships are of opinion that the decree of the High Court ought to be reversed, and the appeal to that Court dismissed, with costs, and the decree of the Lower Court affirmed, and they will humbly advise Her Majesty to order accordingly.

The Respondents other than the Secretary of State for India in Council must pay the costs of this appeal.

Solicitors for Appellants : *T. L. Wilson & Co.*

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Feb. 4, 5.

KHAGENDRA NARAIN CHOWDHRY AND OTHERS . . . . . } PLAINTIFFS ;

AND

MATANGINI DEBI AND ANOTHER. . , . DEFENDANTS.

(CONSOLIDATED APPEAL)

ON APPEAL FROM THE HIGH COURT OF BENGAL.

Practice—Suits for Exclusive Possession—Decrees of Dismissal reversed—Decree in Consolidated Appeal for possession of Moieties.

Where each of two zemindars failed in separate suits instituted for that purpose to prove a title to the exclusive possession of a piece of water as a portion of his estate, but there was cogent evidence of possession having been enjoyed by both :—

Held, in a consolidated appeal, that the decrees of the Courts below dismissing the suits were erroneous, and that each of the zemindars should be declared entitled to an equal moiety of the property in dispute, opposite to and adjoining their respective zemindaris, with possession accordingly.

CONSOLIDATED APPEAL from two decrees of the High Court (May 21, 1885).

These were two suits by the Appellants and Respondents respectively, each against the other, for exclusive possession of the piece of water the subject thereof.

The Subordinate Judge of *Goalpara* dismissed the suit of the Appellants, and decreed that of the Respondents. The High Court in appeal dismissed both suits ; with the result that the Government, which had entered into possession as stakeholders and had never made any claim thereto, would remain in possession as proprietors.

Cowie, Q. C., and *Branson*, for the Appellants.

Doyne, and *C. W. Arathoon*, for the Respondents.

**Present* :—LORD WATSON, LORD MORRIS, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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LORD MORRIS :—

. These two appeals, which have been consolidated, come before their Lordships on appeal from the High Court at *Calcutta*. The High Court came to the conclusion that neither party had proved their case, and that both the suits instituted in the Subordinate Court should be dismissed with costs.

It appears that the Subordinate Judge had decided in favour of the zemindars of *Mechpara*, and had given them a decree, setting aside an order of attachment which had been issued by the magistrate under the 530th and 531st sections of the *Criminal Procedure Code*, and declaring in favour of their title to the sota in dispute, and to the consequent relief.

Their Lordships are of opinion that the decrees of the High Court cannot be sustained, although their Lordships concur in the decision on the matters of fact which the High Court arrived at, namely, that neither of the parties, the zemindars of *Mechpara* or their representatives on the one side, or the zemindars of *Chapar* or their representatives on the other, has proved a title to the exclusive possession of the sota in question. The *Mechpara* zemindars claim the piece of water as the northern boundary of that part of their estate, and included in their estate, and known as "the Kodalkati Bill, Bahirgacha danga," while the *Chapar* zemindars allege that the piece of water is a portion of their estate and is called the "Tiluckmara sota." The identity of the place appears to be very clear upon the map made by the Amin who was sent to survey it, and that is the map which their Lordships now deal with, and which was dealt with by the High Court, and by the Subordinate Judge. Their Lordships arrive at the same conclusion as the High Court with regard to the insufficiency of proof given either by the zemindars of *Mechpara* or by the zemindars of *Chapar* as to the right and title to the exclusive possession of the sota in question. But their Lordships are of opinion that the decrees of the High Court cannot be supported as pronounced by the High Court. They are of opinion that, although neither party has proved a title to an exclusive possession, there can be

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no doubt that possession belongs to the zemindars of *Mechpara* and to the zemindars of *Chapar*.

The Government who have attached the valuable point of the fishery pending this litigation make no claim, and they are really in the position of stakeholders.

The evidence, in the opinion of their Lordships, is insufficient, as already stated, to establish an exclusive possession by either of the parties. On the other hand, it is equally cogent in their Lordships' opinion to shew that there is possession between the two.

The result that their Lordships arrive at is, that the decrees of the Subordinate Court and of the High Court should be respectively reversed, and each of the parties be declared entitled to an equal moiety of the sota opposite to and adjoining their respective zemindaris, and be decreed to be put into possession thereof accordingly, and that both of the parties having failed in their contention as to an exclusive possession, each should bear their own costs of the litigation in the Subordinate Court, in the High Court, and of these appeals; and their Lordships will humbly advise Her Majesty accordingly.

Solicitors for Appellants above named: *Watkins & Lattey.*

Solicitors for Respondents above named: *T. L. Wilson & Co.*

RANI HEMANTA KUMARI DEBI . . . PLAINTIFF; J. C.*

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AND

March 25.

BROJENDRA KISHORE ROY CHOWDRY DEFENDANT.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice—Second Appeal—Substantial Defect in Procedure.

Where the first Appellate Court had, in the absence of evidence, found that a deed of compromise upheld by the lower Court was not for the benefit of a certain infant :—

***Held*, that this was a substantial error or defect in the procedure of the first Appellate Court, and that the High Court was right in second appeal in restoring the decree of the lower Court.**

APPEAL from a decree of the High Court (August 6, 1886), reversing a decree of the District Judge of *Mymensingh* (Nov. 10, 1885), which reversed a decree of the Subordinate Judge of *Mymensingh* (March 30, 1885), dismissing the Appellant's suit.

The facts are stated in the judgment of their Lordships.

Doyne and *Mayne*, for the Appellant.

Branson and *Hunter*, for the Respondent.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

This is an appeal from a decree of the High Court at *Calcutta* in a suit for enhancement of the rent of a talook which was instituted in July, 1882. The Plaintiff is entitled to a ten annas share of the zemindari on which the talook was dependent ; and another person is entitled to a four annas share.

The only ground of defence which it is necessary now to notice is that a deed of compromise was executed in August, 1825, by virtue of which the Defendants allege that the rent of the talook was permanently settled. That deed was executed by *Rani*

* *Present* :—LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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Bhubanmoyi Debi, who was the widow of *Raja Juggut Narain*, to whom the property had belonged, and who had adopted, before the execution of the deed, *Harendra Narain Roy*, the grandfather of the Plaintiff.

The circumstances under which this deed of compromise was executed are these. Some time before March, 1823, a suit was brought by *Rani Bhubanmoyi Debi* and *Krishen Indra Narain Rai*, the owner of the other four annas of the zemindari, for enhancement of the rent of the talook; and the defence set up to that suit by the ancestors of the present Defendants was that the mouzahs had been granted to them in permanent mokurrurri, and that the rent was not liable to be enhanced. The suit was brought in the Zillah Court, and a decree was made in favour of the Plaintiffs, deciding that the rent was liable to be enhanced, and that if the Defendants did not pay the rent demanded, the mehals in dispute should be measured according to the hustbood jarib stated by the Plaintiffs, and the jumma be assessed thereon. An appeal from this decree to the Civil Appellate Court was dismissed on the 11th of May, 1824. In that state of things the deed of compromise was made in August, 1825. It was addressed to *Joygobind Mozoomdar*, the ancestor of the Defendants, and was executed by *Rani Bhubanmoyi*; it states that the Defendants were paying the annual istimrari rent of Rs.399 odd, with progressive increase added, that, in appeal to the Court of the Zillah and the provincial Court at *Jahangirnuggur*, a decree was passed for measurement and ascertainment of gross rents, and that for amicably settling with the Defendants for an increase in the rent, the rent was fixed at sicca Rs.600, including the old rent. The balance payable by the Defendants, after certain named deductions on account of their share, was fixed in perpetuity. The Defendants also presented a petition to the Court, saying that they assented to that compromise.

Nothing more appears to have taken place, except that the rent was regularly paid according to the compromise, until about 1854, and then a suit was again brought for enhancement of rent. That passed through various stages of appeal until it reached the Sudder Court. In the judgment of two of the Judges of the Sudder Court (three being present) it is stated

that *Rani Bhubanmoyi* executed a deed of compromise, and from that time up to the period of the adopted son, *Harendra Narain Roy*, attaining his majority, the rent was collected according to the deed of compromise, and after that time until the institution of that suit in 1853.

Then they say :—"Under these circumstances we are of opinion that the Rajah is bound by the act of his mother done in 1832, as his guardian, and acquiesced in by him since he reached his majority, unless he can shew that it was done in contravention of her duty to him as his guardian : in other words, unless he can shew that with reference to the circumstances under which, and to the then capabilities of the tenure regarding which the compromise was made, such compromise was clearly and unmistakably to his detriment." There is a clear finding by the Sudder Court upon the question whether *Rani Bhubanmoyi* was acting as guardian when she signed this deed of compromise that she was so acting. It must, therefore, now be taken that she did it as guardian.

The circumstances existing at the time of the compromise must next be considered. The parties were litigating not merely as to whether the rent was of the proper amount, or ought to be enhanced, but the Defendants were contending that they had a perpetual tenure at a then fixed rent, and this was a settlement which was to put an end to the litigation, and which would also prevent the expense, and delay, and the uncertainty of the result, which was dependent upon the investigation that the Court had ordered to decide what the amount of rent, if it were to be enhanced, should be. Apparently it is a compromise which it cannot be said would not be beneficial to the infant, the adopted son, but is one which might fairly and naturally be come to as putting an end to the litigation and deciding once for all the matter which was in dispute between the parties ; because it must not be forgotten that although there had been a decree affirmed on appeal that the rent was liable to be enhanced, that was subject to a further appeal, and the case might have been carried further by the Defendant if this compromise had not been entered into.

The first Court before which the present suit came held that

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the compromise was binding, and dismissed the suit. It then went by appeal to the District Judge, who reversed that decree, and held that the compromise was not binding ; it then came before the High Court by what is called a second appeal, or an appeal from an appellate decree, and as the High Court in its judgment states what the judgment of the District Judge was, it will be convenient to refer to the judgment of the High Court. They say, "We are of opinion that although the dismissal of the suit of *Harendra Narain Roy*, under sect. 1, Act 'XXIX of 1841" (meaning the dismissal of the suit which was brought in 1854, and which was finally dismissed, after being remanded to the lower Courts for further hearing, on account of the non-appearance of both of the parties), "did not preclude a fresh suit, still if any such suit be brought, the parties would be bound by the decision of the Sudder Dewani Adawlut, so far as it decided any material issue. The District Judge in this case is in error in re-opening that question. We must therefore take it that the ruffanamas" (deeds of compromise) " were executed by *Rani Bhubanmoyi* as the guardian of *Harendra Narain Roy*. We find also that the same rent fixed by the ruffanamas has been received by successive owners of the zemindari for about fifty-seven years. We further find that since the last suit for enhancement was dismissed in 1858, no attempt was made to repudiate the ruffanamas till 1882." Then they speak of the principle laid down in the case of *Hunooman Pershad Panday* v. *Babooee Munraj Koonweree* (1), and go on to say that the District Judge, upon the question whether the compromise was beneficial or not to the adopted son, "refers only to the decree of 1851 passed in favour of the owner of the four annas share of the zemindari. But that decree which was passed in 1851 has no bearing upon the question whether the ruffanamas executed in the year 1825 were clearly and unmistakably to the detriment of *Harendra Narain Roy*." Now the decree in 1851 was obtained by the Government after there had been a purchase at a sale for arrears of revenue not paid by the owner of the four annas share, and the District Judge appears to have been in error in treating that as a decree passed in favour

(1) 6 Moore's Ind. Ap 393.

of the owner of the four annas share. The Government was in a different position from that in which the owner of the four annas share would be, and there is no evidence in the case upon which the District Judge could found his judgment reversing the decree of the first Court, and deciding that this compromise was not beneficial to the adopted son, an infant at the time it was made. When the judgments come to be looked at, it appears that he has reversed the decree of the first Court in the absence of any evidence—certainly in the absence of any evidence upon which he might reasonably come to the conclusion that the deed of compromise was not for the benefit of the adopted son. This appears to be a case in which, under the provision of the law that there is a second appeal where there has been a substantial error or defect in the procedure of the lower Court, the High Court was right in reversing the decree of the District Judge, and leaving, as it did, the decree of the first Court—which held that the deed of compromise was a binding one, and therefore the suit for the enhancement of rent ought to be dismissed—to stand.

Their Lordships will therefore humbly advise Her Majesty to dismiss this appeal, and to affirm the decree of the High Court. The Appellant will pay the costs.

Solicitors for the Appellant : *T. L. Wilson & Co.*

Solicitors for the Respondent : *Neish & Howell.*

J. C.* 1890 March 13.

RAM LAL . . . . . PLAINTIFF;

AND

SAIYID MEHDI HUSAIN AND OTHERS . . DEFENDANTS.

ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.

Practice—Concurrent Findings of Fact.

The rule as to not disturbing current findings of fact observed notwithstanding that part of the evidence was not considered by the first Court.

APPEAL from two decrees of the Judicial Commissioner (April 13, 1886) confirming in appeal and cross-appeal a decree of the District Judge of *Lucknow* (March 18, 1885), so far as it dismissed the Appellant's claim to Rs.11,175, and varying it as to the remainder of the Appellant's claim.

The facts are stated in the judgment of their Lordships.

Mayne, for the Appellant.

Doyne, and *David*, for the Respondent *Saiyid Mehdi Husain*.

Cowie, Q. C., and *Branson*, for the Respondents *Ashgar Husain* and *Agar Jain*.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

The suit in which this appeal is brought was instituted by the Appellant, *Ram Lal*, as Plaintiff, to recover moneys alleged to have been advanced by him to the first Respondent, *Saiyid Mehdi Husain*, as agent for a lady who has died during the progress of the litigation, and who is now represented by the last two Respondents. A sum of about Rs.30,000 was claimed as due on a bond dated the 13th and registered on the 19th of September, 1883. A further sum of about Rs.9000 was claimed as

* *Present*:—LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

having been advanced in various amounts between the 20th of September, 1883, and the 25th of December in that year.

The lower Court allowed the whole amount claimed as due on the bond. The Judicial Commissioner disallowed Rs.4000. That disallowance forms one of the grounds of appeal.

In support of his claim to the Rs.9000 the Appellant relied, first, on oral evidence of a promise to repay the amount; both Courts rejected this evidence. Secondly, he relied on certain accounts which he produced; both Courts rejected those accounts. Thirdly, he relied on an alleged receipt purporting to be signed by *Mehdi Husain*, and to be dated the 26th of December, 1883. The Respondent on oath denied that the signature was his. The lower Court rejected this receipt for want of a stamp. The Judicial Commissioner remanded the case for further evidence as to the genuineness of the document. When the case came back, he rejected the alleged receipt on the merits. And so the claim failed in both Courts.

It was contended by the learned counsel for the Appellant that the case as regards the Rs.9000 does not fall within the ordinary rule applicable to two concurrent findings of fact, because the lower Court had not an opportunity of considering, and did not consider, the evidence as to the genuineness of the receipt of the 26th of December, 1883. Their Lordships are not prepared to hold, either in this particular case or as a general rule that the mere fact that a part of the evidence in the suit has not been considered by the lower Court prevents the ordinary rule from applying when both Courts have arrived at the same result. In the present case, however, as the whole of the evidence has been brought to their Lordships' notice, they think it right to add, that in their opinion the Judicial Commissioner could not have come to any other conclusion.

When the case was remanded, the Appellant did not think proper or was unable to produce any evidence as to the genuineness of the receipt on which he relied; but for some reason or other the Respondent, *Mehdi Husain*, called the Appellant, and in cross-examination by his own pleader the Appellant said that the receipt was signed by *Mehdi Husain*. There was no corroborative evidence on the point. The Appellant, in regard to

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other statements of his, was held to be a person on whose uncorroborated testimony the Court could not safely depend. Under these circumstances, though it would have been more satisfactory if the Judicial Commissioner had referred to the Appellant's assertion, their Lordships cannot say he was wrong in treating it as unworthy of notice.

As regards the Rs.4000, there are not two concurrent findings of fact. Here the position of the parties is reversed. The Respondent, *Mehdi Husain*, relies on an acknowledgment or rukka which the Appellant says is not genuine. The Judge of the lower Court decided against *Mehdi Husain* principally on two grounds. One was that the rukka, if genuine, ought to have been mentioned to the registrar when the bond was registered; the other was that the respondent in another suit had made a statement with regard to the advance of the money which the learned Judge considered, "if not false, certainly to be misleading". Their Lordships cannot attach any significance either to the fact that the rukka was not mentioned to the registrar, or to the statement in the other suit which appears to their Lordships not to be inconsistent with the Respondents' present case.

Having listened to the evidence, their Lordships find themselves unable to dissent from the finding of the Judicial Commissioner. There is very great difficulty in determining, if it is possible to determine, on which side the truth lies in this part of the case; and the learned counsel for the Appellant has not satisfied them that the Judicial Commissioner was wrong.

In the result, their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed; the Appellant will pay the costs of the appeal; but there will be only one set of costs between the Respondents.

Solicitors for Appellant: *Barrow & Rogers.*

Solicitors for the first Respondent: *T. L. Wilson & Co.*

Solicitors for the other Respondents: *Hores & Pattisson.*

MUSSAMMAT HAYAT-UN-NISSA AND OTHERS PLAINTIFFS; AND SAYYID MUHAMMAD ALI KHAN . . . DEFENDANT.

J. C.*

1890

Jan. 22, 23, 24; *Feb.* 8.

ON APPEAL FROM THE HIGH COURT FOR THE NORTH WESTERN PROVINCES.

Mahomedan Law—Sunni Rules of Descent—Evidence as to Sect of Deceased.

Case in which it was held on the evidence that a deceased Mahomedan widow died a Sunni, and that, therefore, her estate descended according to the Sunni rule of descent. It was admitted that during the marriage to a Shia husband the deceased's outward acts and observances amounted to a profession of the Shia faith. But the evidence raised a presumption that from birth till marriage the deceased was a Sunni, and established that during widowhood she returned to the Sunni sect, discarding the religion which had been temporarily imposed upon her as a Shia wife.

APPEAL from a decree of the High Court (Nov. 27, 1884) reversing a decree of the Subordinate Judge of *Moradabad* (Dec. 4, 1882).

The question in the appeal was one of evidence and its effect, whether *Wazir-un-Nissa* died a Sunni or a Shia.

Mayne, for the Appellants.

Doyne, and *R. C. Saunders*, for the Respondent.

The following cases and authorities were referred to: *Hamilton's* Hedaya, Preliminary Discourse; *Wujib-on-Nisa Khanum* v. *Mirza Husun Ali* (1); *Rajah Deedar Hossein* v. *Ranee Zuhoor-oon-Nissa* (2); *Mirza Kasim Ali* v. *Mirza Muhammad Hosen* (3).

The judgment of their Lordships was delivered by

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Feb. 8.

LORD WATSON:—

This suit relates to the immoveable estate of *Wazir-un-Nissa*, a Mahomedan lady, who died childless and intestate on the

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

(1) 1 Sel. Rep. 266.

(2) 2 Moore's Ind. Ap. 441, 469.

(3) 5 Sel. Rep. 213.

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26th of October, 1881. Her father, *Ghulam Ali*, died without male issue in the year 1838, leaving three widows, two of whom were childless. Besides the deceased, whose succession is now in dispute, *Ghulam Ali* had another daughter, *Kulsum*, married to *Iradat Ali*, there being one son of their marriage, who died in minority; and eventually *Iradat Ali* became entitled, as heir of his minor son, to his wife's share of her father's estate. After the death of *Kulsum*, *Iradat Ali* became the husband of *Aswat-un-Nissa*, one of the parties to this appeal.

The Appellants, Plaintiffs in the suit, are the female descendants of *Basawan Ali*, the maternal uncle of the deceased *Wazir-un-Nissa*. The Defendant in the suit, and Respondent in this appeal, is *Muhammad Ali Khan*, a collateral relative of the deceased in the ascendant line. The common ancestor of the parties was *Karamat Said*, whose younger son was father of *Daud Ali*, the father of the Respondent. The elder son of *Karamat* had two sons, *Kasim*, the father of *Ghulam Ali*, already mentioned, and *Farzand*, who died without issue. The Appellants are Mahomedans, and so were *Karamat* and all his descendants, and the case must be decided according to the principles of Mahomedan law. But the rules of that law applicable respectively to Shia and Sunni succession are different; and, therefore, the true heirs of *Wazir-un-Nissa* can only be discovered by first ascertaining to which of these rival sects the deceased belonged at the time of her death. The Appellants allege that she was a Shia, the Respondent that she was a Sunni. It is admitted that, according to the Shia rule, the Appellants are her legal heirs; and it is also matter of admission that, according to the Sunni rule, the Respondent, being a paternal ascendant tracing his connection with the deceased through an unbroken line of males, is entitled to take her estate to the exclusion of the Appellants, whose relation to her is through a female. Whether the deceased was, in point of fact, a Shia or a Sunni, is the single issue presented for decision.

Wazir-un-Nissa was for many years the wife of *Sayyid Hadji*, a staunch member of the Shia sect, who died in the beginning of the year 1865. The case made by the Appellants in their pleadings and evidence is to the effect that *Karamat* and all his

descendants were Shias ; that *Wazir-un-Nissa* was the daughter of a Shia, and brought up as a Shia ; that she married a husband of her own sect, and ever after his death continued to adhere to the faith and to practise the ceremonies of that sect. On the other hand, the case presented in the Respondent's evidence is that *Ghulam Ali* and his daughter *Wazir-un-Nissa* were Sunnis ; that she was under the necessity of suppressing her true faith during the subsistence of her marriage, and of conforming outwardly to that of her husband ; and that, on his decease, she resumed observance of the rites peculiar to the Sunni sect, and lived and died a member of it.

Upon all points material to the issue thus raised, with one or two exceptions, the oral evidence adduced by the parties is in direct conflict. There is evidence of a more reliable character, which may be used to test the value of the oral testimony, but even that evidence is not wholly consistent. The onus of proving that the deceased was a Shia rests in the first instance with the Appellants, because they are seeking to eject the Respondent, who is in possession, and has been duly registered as owner in the books of the revenue authorities. The Subordinate Judge gave decree for the Appellants in terms of their plaint, but his decision was reversed on appeal by the High Court, consisting of Chief Justice *Petheram* and Mr. Justice *Mahmood*, who dismissed the suit, with costs. In his elaborate opinion the Subordinate Judge rests his judgment mainly on the evidence of the Appellants' witnesses. He refers by name to two of these, whom he describes as respectable and literate men, viz., *Mirsa Abid Ali Beg*, the Subordinate Judge of *Mainpuri*, and *Maulvi Tafazzul Husain*, the *Pesh Imaum* of the Shias, by whom prayers are read to the congregation. There can be no reason to doubt that the learned Judge rightly describes the character of these witnesses, but the first of them does not state to which sect *Wazir-un-Nissa* belonged ; and the second, although he was acquainted with her husband, did not know *Wazir-un-Nissa*, and his belief that she was a Shia was derived from "women of his brotherhood." On the other hand, the learned Judges of the High Court placed little reliance upon the statements of witnesses to the effect that the deceased was a Shia or a Sunni, being of opinion that certain

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facts, as to which there is no conflict of testimony, were sufficient, when taken in connection with the written evidence, to indicate that *Wazir-un-Nissa*, although she appeared to be a Shia during her married life, was in reality a Sunni.

The oral evidence is not only contradictory but vague, and it is obvious that the bulk of the witnesses speak with little knowledge or from hearsay. But one part of it which is not open to that observation, is unquestionably favourable to the Respondent's case. It shows that, after her husband's death, *Wazir-un-Nissa* made a journey to *Ajmere*, in order to visit a Sunni shrine, in the company of a "pir," or spiritual guide of the Sunni sect, whose office and its functions are unknown among the Shias. It also shews that on her way to *Ajmere* the deceased partook of the holy meals, which are intended for Sunnis, in the house of the pir. These facts were hardly disputed in the argument addressed to us for the Appellants; but the Subordinate Judge, who is conversant with the religious customs of both sects, disposes of them by the observation, that "thousands of Hindus and Mahomedans, both Shias and Sunnis, especially women who are not acquainted with their religion, visit the shrine without changing their creed." The learned Judge makes no reference to the length of the pilgrimage, or to the companionship in which it was made. Mr. Justice *Mahmood*, who has no less knowledge of Mahomedan sects, says that the fact of the deceased having availed herself of the pious services of a pir, implies a state of things which has no existence among the Shias, and that "it may safely be asserted that, if *Wazir-un-Nissa* had been a Shia, she would never have gone to *Ajmere* as she did." The opinions thus expressed by the learned Judges are not necessarily inconsistent. According to that of the Subordinate Judge, the deceased, being a Shia, might very well have visited the *Ajmere* shrine if she was a woman unacquainted with the distinctive tenets of her sect; but he does not go so far as to say that she would, even in that case, have resorted to the ministrations of a Sunni pir. In any aspect of them, the facts create an inference adverse to the Appellants. The most favourable inference of which they are susceptible is, that *Wazir-un-Nissa*, after her husband's death, did that which would naturally be expected of

a devout Sunni ; but that she might possibly have acted as she did, if she was an ignorant professor of Shia principles. On the other hand, if the opinion of Mr. Justice *Mahmood* be taken as correct upon this point (and there is nothing in the opinion of the Subordinate Judge which necessarily controverts it), these facts shew that at the time of her pilgrimage *Wazir-un-Nissa* professed her adherence to the Sunni faith. There is also oral evidence, not so clear or reliable as that which relates to the *Ajmere* pilgrimage, but tending in the same direction, to the effect that the deceased, during her widowhood, regularly observed the eleventh day of each month, and held Maulud Sharif meetings in her house, these being addmittedly Sunni rites.

The facts proved, with respect to the religious observances of the deceased *Wazir-un-Nissa* after her husband's death, all support the conclusion that she was a Sunni at the time of her own decease. It is, however, possible that these circumstances might be explained away, and, at all events, the evidence in support of some of them, which is not without contradiction, would be materially weakened if it were established that her father was a Shia, in which case there would be a very strong presumption that she was educated in his faith, and continued in it until her marriage. That fact, if proved, might cast upon the Respondent the onus of shewing that on the dissolution of her marriage she left the Shia and joined the Sunni sect. It is therefore necessary to refer to the period antecedent to her widowhood, and to the evidence which bears upon it. The oral testimony as to the sect of her father, *Ghulam Ali*, is vague, and directly conflicting ; and the written evidence, which is not free from conflict, becomes the only reliable test of the truth of the statements made by witnesses on the one side or the other.

Their Lordships do not attach much weight to the litigations in 1805 and 1810, between *Kasim*, the paternal grandfather of *Wazir-un-Nissa*, and his brother, *Farzand*, with respect to the succession to their father. In the first of them *Kasim* founded on a deed of gift from his father, which *Farzand* alleged to be invalid ; and the question of its validity was referred by the Sudder Judge to the kazi and the muftis of his Court, who returned an opinion that the gift was bad. The judgment of the

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Court went in favour of *Kasim*, upon grounds which did not involve any question as to the validity of the deed. In the second of them, which raised the same controversy, the Court merely repeated its former judgment. It is admitted that the opinion of the kazi and muftis was founded upon a principle peculiar to Sunni law, which denies effect to a gift of lands in which the shares of the donees are not specially defined. The Respondent relies upon the terms of that opinion as evidencing the agreement of the parties to the suit that their father, *Shah Ali*, was a Sunni. But it must be kept in view that, at the date of these proceedings, the only course of succession recognised by the Native Courts was that of the Sunnis, which had been the general law of the country from the time when it first came under Mahomedan rule; and it is by no means certain that the Sudder Court, or litigants before it, always paid regard to, or understood their rights under the Shia law.

The observation just made does not apply to the state of the law in 1838, when the estate of *Ghulam Ali* was divided. Long before that time the supremacy of Sunni law had disappeared, and it must have been generally known that the Shia rule governed the succession of Shias, and the Sunni rule that of Sunnis. If *Ghulam Ali* was a Shia, his two childless widows had no right of inheritance, and were only entitled to maintenance from his estate. If he was a Sunni, then these widows were proper heirs, entitled to a share of his estate along with his other representatives, who were the same according to the rule of either sect. That *Ghulam Ali's* succession was treated by all parties interested as that of a Sunni, and that his childless widows received the shares which the Sunni law allots to them, appears to be established by the evidence. There is in process an attested copy of the official report made to the Collector of Revenue on the occasion of *Ghulam Ali's* death, in which it is stated that these two widows, along with the two daughters of the deceased, *Kulsum* and *Wazir-un-Nissa*, and their mother, were his heirs at law. *Vilayat Husain*, a witness for the Appellants, states that "*Husaini Begum*, wife of *Ghulam Ali Khan*, also received a twenty-fourth share out of her husband's property; other wives also received shares in the same proportion." Now it

is significant that *Husaini* was one of the childless wives, and that one twenty-fourth is the exact proportion to which each of the three widows was entitled in terms of Sunni law. That each of the widows got that share of her husband's estate is not contradicted, but two of the Appellants' witnesses allege that they did not inherit it, and that it was given them in compromise of their claim of dower under the Shia law. On the face of it the statement is improbable, and it is disproved by the written evidence. There is a sale deed, dated the 11th of July, 1877, by *Kulsum*, one of the childless widows, by which she made over to Shikh *Imam-ud-din* her interest in property "held conjointly with *Sayyad Iradat Ali*, *Abid Ali*, and *Mussumat Wazir-un-Nissa*, muafi-holders, of which the twenty-fourth share belongs to me, as inherited from my husband, and up to this moment I am in possession thereof." That was followed in September, 1847, by a pre-emption suit, at the instance of *Iradat Ali*, which he was entitled to bring, as in right of his minor son, on the ground that the interest sold by *Kulsum* came to her by inheritance from her husband, *Ghulam Ali*. There would have been no pretext for such a claim, if *Kulsum* had acquired her share by purchase, and not by inheritance. An ingenious argument was addressed to us by the Appellants' counsel for the purpose of shewing that the deed of sale and the copy plaint were not duly filed, and were not proved to be genuine; but both documents have been transmitted as part of the record in this appeal, and were founded on, in the judgment of the High Court. Besides, the fact that such a suit was brought is elicited by the Appellants themselves on cross-examination. In these circumstances it is impossible to reject the documents *quantum valeant*, and it is obvious that, if the Appellants meant to discredit them, *Iradat Ali*, who is husband of one of them, ought to have been called as a witness.

The fact that *Ghulam Ali's* succession was, immediately after his decease, treated as that of a Sunni by all parties interested, who were also those most nearly connected with him by ties of blood or affinity, would be well-nigh conclusive, if it stood alone, as to the sect of which he was a member; and, in the absence of other evidence, would naturally lead to the conclusion that, before her marriage, *Wazir-un-Nissa* was also a Sunni. But the

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Appellants rely upon a judicial statement made on behalf of *Wazir-un-Nissa* herself, in 1864, as evidencing the contrary. In the beginning of that year, *Daud Ali*, the Respondent's father, brought a suit for redemption of a mortgage granted by *Farzand*, his own cousin, and paternal uncle of *Ghulam Ali*. In that suit *Iradat Ali* and the deceased *Wazir-un-Nissa* intervened and claimed the right of reversion, on the ground that they, and not *Daud Ali*, were the legal heirs of the mortgagor, under the rules of the Imamia, which is the Shia sect. The rights of the parties claiming the reversion did not depend upon their own religion, but upon that of *Farzand* the mortgagor ; but in the written statement lodged for them it was broadly averred that not only *Farzand*, but all the parties to the suit, belonged to the Imamia sect. In answer to that averment *Daud Ali* stated that "although the parties belong to the Imamia sect, yet in the family of the parties the distribution of inheritance takes place according to the rules of the Sunni sect, and the same are still acted upon."

Had *Daud Ali* contented himself with the admission that *Farzand* was a Shia, his statement would have been sufficient for the purposes of the suit. But he does not dispute the allegation that the parties to the suit, including *Wazir-un-Nissa*, were Shias. If the assertion made by the interveners had been deliberately sanctioned by *Wazir-un-Nissa*, it would prove her to be a Shia at the time when it was made, and might also suggest the inference that she had been brought up as a member of the Shia sect. But there is no evidence to shew that *Wazir-un-Nissa* personally authorized the statement which was made on her behalf. The probability is that it was made by *Iradat Ali*, either at his own hand and for his own purposes, or with the authority of her husband. The latter was alive at the time, and she was, outwardly at least, conforming to his religion, which was undoubtedly that of a Shia. It has already been noticed that *Iradat Ali* must be taken to have admitted, in 1838, against the interest of his family, which was virtually his own interest, that *Ghulam Ali* was a Sunni, and that begets a presumption that his daughter was also a Sunni until the time of her marriage. In the absence of any explanation from *Iradat Ali*, it cannot be assumed that the statement made in 1864 was meant to contradict that inference,

or to go beyond the assertion that at the time when it was made *Wazir-un-Nissa* was a Shia.

In these circumstances, their Lordships have come to the conclusion that the evidence applicable to the period preceding the death of her husband tends, though not strongly, to the inference that, from her birth until her marriage, *Wazir-un-Nissa* was a Sunni. It is not matter of dispute that, during the whole period of her married life, her outward acts and observances amounted to a profession of the Shia faith. What the just inference from these facts would have been, had she died on the same day as her husband, it is not necessary to consider. The evidence applicable to the period following the dissolution of her marriage appears to their Lordships to point strongly to the conclusion that, throughout her widowhood, she was a member of the Sunni sect, having returned to the religion of her youth, and discarded that which was temporarily imposed upon her by the necessities of her position as a Shia wife. They will accordingly humbly advise Her Majesty that the judgment of the High Court ought to be affirmed. The Appellants must bear the costs of this appeal.

Solicitors for the Appellants : *Robinson & Turnbull.*

Solicitors for the Respondent : *Bird & Moore.*

J. C.* 1890 Feb. 13, 14; March 15.

HAIDAR ALI AND ANOTHER . . . . . PLAINTIFFS;

AND

TASSADUK RASUL KHAN AND OTHERS . DEFENDANTS.

ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.

Oudh Estates Act, 1869, ss. 2, 20, 22 (6)—*Will—Registration—Law of Succession—Brothers—Sons of Predeceased Brother.*

Held, that a statement purporting to be of a testamentary character made by a talookdar in reply to inquiries by the Government under Circular Orders regarding the succession of talookdars, and subsequently recognised by the talookdar as his will, comes within the definition of "will" in sect. 2 of Act I of 1869.

Hurpurshad v. *Sheo Dyal* (Law Rep. 3 Ind. Ap. 259) followed.

Such will is not revoked by another will void for non-registration under sect. 20 of the said Act, nor by the provisions of the Act.

Held, that by the true construction of sect. 22, sub-sect. 6, brothers take in the same manner as sons are directed to take by the earlier sub-sections, and that the descendants of a predeceased elder brother are preferential heirs to the younger surviving brother.

APPEAL from a decree of the Judicial Commissioner (June 8, 1885), affirming a decree of the District Judge of *Lucknow* (Nov. 19, 1883), which dismissed the Appellants' suit.

The questions in dispute related to the right to succeed to the estate of Rajah *Farzand Ali*, deceased, the talookdar of *Jehangirabad*, who had died on the 30th of November, 1880, leaving no issue, except his daughter, the Respondent *Zebunnissa*, who was the wife of the Respondent *Tassaduk*.

The deceased talookdar held his talook of *Jehangirabad* under a sanad containing a condition of descent to the nearest male heir, according to the rule of primogeniture, in the event of the talookdar dying intestate and without having adopted. His name was entered in the second of the lists of talookdars prepared under the 8th section of the *Oudh Estates Act*, 1869. *Haidar Ali*, as the eldest surviving brother, claimed, in the first place, to succeed, under the 22nd section of the *Oudh Estates Act*

* *Present* :—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

and the condition of the sanad, to the original talook, on the ground that the late talookdar had died sonless and intestate, and without having adopted. Secondly, to succeed, in accordance with the provisions of sect. 14 of the Act, as well as of the 22nd section, to the immoveable properties which *Farzand Ali* had acquired by transfer from other talookdars, as also to certain heirlooms devolving with the talook under the 7th section of the Act. Thirdly, to succeed, under the ordinary Mahomedan Law of Inheritance of the *Hanifa* or *Sunni* sect, to one-fourth of the immoveable properties which *Farzand Ali* had acquired from zemindars and others not holding sanads, as also of the moveable properties, cash and debts belonging to the estate of *Farzand Ali* at the time of his death. And the Plaintiff charged that the two documents relied on by the Defendants as wills, and dated the 19th of August, 1879, and the 1st of November, 1879, and under which they had wrongfully taken possession, were, if genuine, illegal and invalid.

The facts are sufficiently stated in their Lordships' judgment.

Both Courts held that the document of the 6th of April, 1860, was genuine and testamentary; the first Court holding that it was revoked by the will of the 19th of August, 1879, as a registered and operative will; the second Court holding that it was not so revoked or at all, and that the will of 1879 had not been duly registered.

The Courts differed also as to the adoption of *Tassaduk*, the Judicial Commissioner finding against it.

Both Courts held that a family custom had been proved among the *Shaikh Kidwais*, whereby daughters succeeded in preference to brothers. The effect of the Judicial Commissioner's decision was that under the will of the 6th of April, 1860, the talook of *Jehangirabad* passed to *Tassaduk*, while the self-acquired talookdar's estate went to *Naushad Ali Khan*, and the residue of *Farzand Ali's* estate went to his daughter, and the Appellants' suit was wholly dismissed.

Doyne and *Cowell*, for the Appellants, contended that the document of the 6th of April, 1860, was not testamentary or intended to be such. It was a mere reply to a question put by the Govern-

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ment as to whether *Farzand Ali* desired the rule of primogeniture to be applied to his talook or not. Taking it to be a will, it was revoked by his subsequent conduct and language when applying for a sanad. It was also revoked by the will of the 19th of August, 1879. Though that will was invalid for want of registration as regards the talookdar's estate, it was valid to revoke the previous will. If the earlier will was operative, it nevertheless did not relate to the after-acquired talookdar's estate, and the Appellants were, at least, entitled to succeed to them. It was also revoked by the Act of 1869, which rendered previous wills not executed as required by the Act invalid. As to the non-talookdari estate, there was no legal proof of the alleged custom in supersession of the ordinary Mahomedan law. The wajibulurzes could not be relied on. They related to villages belonging to other non-talookdari families and estates: and see *Uman Parshad* v. *Gandharp Singh* (1). Consequently *Haidar Ali* was in any event entitled to succeed to his share of all the non-talookdari property in excess of the one-third share which alone *Farzand Ali* could by Mahomedan law have validly bequeathed.

Cowie, Q.C., *Graham*, Q.C., and *Branson*, for the Respondents, *Tassaduk* and *Zebunnissa*, were not called on.

Mayne, for the Respondent, *Naushad Ali Khan*, contended that he was entitled to hold his bequests under the will and codicil of August and November, 1879, so far as related to non-talookdari property. But however that might be, the custom was proved, and operated to oust the Appellant of any claim he might otherwise have had under Mahomedan law. As regards the property governed by Act I of 1869 but not by the will of 1860, the Appellants shew no preferential title under sects. 4 and 22. First, the property must have come to the Rajah from a transferor holding it as "estate," as defined in sect. 2. There was no evidence as to who the transferors were, whether talookdars or grantees, as defined by sect. 2, or that the properties were "estate" within the meaning of that section. There was nothing to shew that these properties came within either sects. 14

(1) Law Rep. 14 Ind. Ap. 134,

or 15. Secondly, by the true construction of sect. 22, brothers were entitled to succeed in the same manner as sons, and, accordingly, the lineal descendants of *Haidar Ali's* elder brother would exclude him.

Doyne, replied.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

The Plaintiff and Appellant *Haidar Ali* is the elder brother of Rajah *Farzand Ali Khan*, talookdar of *Jehangirabad*, who died without leaving any male issue. He held a sanad for the estate of *Jehangirabad*, and his name was entered in list No. 2, prepared according to Act I of 1869. He left four kinds of property :—

1. The talookdari estate conferred by the sanad.
2. Landed property acquired by him from other talookdars.
3. Immoveable property acquired from persons other than talookdars.
4. Moveable property, money, and debts.

The Plaintiff *Haidar Ali* claimed to be the Rajah's sole heir and successor, and entitled to the first and second classes of property, and to so much of the fourth as might be held to be heirlooms under the provisions of sects. 14 and 22 of Act I of 1869, and to a fourth share, according to the Mahomedan law, of the third class of property and of the fourth, exclusive of heirlooms. The other Plaintiff and Appellant is a purchaser of part of *Haidar Ali's* interest. The Defendants, the Respondents, were in possession, and had obtained mutation of names in their favour in the Revenue Department. Their grounds of defence will be conveniently noticed as the case with regard to each class of property is considered.

As to the first class, the defence of *Tassaduk*, who was in possession of it, was founded on a document, dated the 6th of April, 1860, and a formal will of the Rajah, dated the 19th of August, 1879. The first of these is a statement by Rajah *Farzand Ali* in reply to inquiries by the Government under Circular Orders regarding the succession of talookdars. It is as follows :—
" I am Rajah *Farzand Ali Khan Bahadur*, talookdar of *Jehangi-*

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rabad, &c. Whereas the Government has been pleased to confer upon me the proprietary rights in this estate, to be enjoyed from generation to generation, I do hereby request that after my death my estate may be maintained intact and without partition according to *Raj Gaddi* custom, and that, owing to my not having a male issue, *Zebunnissa*, who is my daughter by Rani *Abbas Bandi*, daughter of Raja *Razzak Baksh*, shall be considered entitled to succession and inheritance. But as I have taken *Tassaduk Rasul* from my brother *Mardan Ali Khan*, and have commenced to bring him up and educate him as my son, if he finishes his education during my lifetime and is married to *Zebunnissa*, he shall after me succeed to my estate as my adopted son."

The Rajah made other replies about the same, the talook being in three districts, in which no reference was made to his daughter or *Tassaduk Rasul*, and it was contended that the reply of the 6th of April was not intended more than the others to be testamentary; but in a letter from the Rajah to the Deputy-Commissioner, dated the 20th of June, 1877, in reply to questions that had been asked, he said in reply to the fourth question, which was to give the name and title of any boy who might be his successor, whether his begotten or adopted son, "The reply to this question refers to the will which has been submitted to the *Lucknow* district through the tahsil of *Kursi* on the 6th of April, 1860." This shews that he intended that to be his will. Their Lordships are of opinion, following the judgment of this Board in *Hurpurshad* v. *Sheo Dyal* (1), that it is a will within the definition in sect. 2 of Act I of 1869. It is therefore a complete answer to the Plaintiff's claim to *Jehangirabad*.

It was contended that it was revoked by the will of the 19th of August, 1879, the Rajah having in that said no document of any sort purporting to be a will or petition, the context whereof is wholly or partly repugnant to it, should be deemed to be admissible. But it is not repugnant. In this the Rajah says that, having adopted *Tassaduk Rasul Khan* as his son, he has appointed him his successor, and he is to be the owner of his entire property, estate and raj, as a rajah and talookdar, and as he is

(1) Law Rep. 3 Ind. Ap. 259.

married to his daughter the estate shall successively "descend to devolve" on the descendants of the daughter. Also the will of 1879 was not registered in accordance with sect. 20 of Act I of 1869, and consequently as regards the talookdari estate is invalid. It cannot, therefore, operate as a subsequent will to revoke the will of 1860, nor was that will revoked by the Act of 1869, as was also contended.

There is, however, another defence to this part of the claim, which also applies to the second class of property if it was acquired according to sect. 14 of the Act. The pedigree, which is admitted by all parties to be correct, shews that *Haidar Ali* was not the eldest brother of *Farzand*. There were two elder brothers, *Sahib Ali* and *Mardan Ali*, who died before *Farzand*, both leaving sons, and the sons of *Sahib* were not parties to the suit. *Tassaduk* is a son of *Mardan Ali*, and *Nawab Ali*, who died pending the appeal, the father of the Respondent *Naushad Ali*, was his eldest son.

The Plaintiff claims, as the elder brother of *Farzand*, to be his sole heir and successor under sect. 22 of Act I of 1869. The section begins by saying that if a talookdar or grantee whose name shall be inserted in the second, third, or fifth of the lists mentioned in sect. 8, or his heir or legatee, shall die intestate as to his estate, such estate shall descend as follows, and then there are eleven sub-sections forming a scheme of descent. The Plaintiff claims under sub-sect. 6, but in construing that the whole of the sub-sections should be looked at. The first says the estate shall descend to the eldest son of the talookdar and his male lineal descendants. The second says that if such eldest son shall have died in the lifetime of the talookdar leaving male lineal descendants, the estate shall descend to his eldest and every other son successively according to their respective seniorities and their respective male lineal descendants. The third says that if such eldest son shall have died in his father's lifetime without leaving male lineal descendants, the estate is to descend to the second and every other son of the talookdar successively according to their respective seniorities and their respective male lineal descendants. That male lineal descendants here are intended to include the descendants of a son dying

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in his father's lifetime is apparent from sub-sect. 4. That is, "Or in default of such son or descendants," then to such son of a daughter as has been treated by the talookdar in all respects as his own son, and to the male lineal descendants of such son. The estate is to go to the daughter's son only in default of male lineal descendants of a second or other son. In sub-sect. 4 male lineal descendants of a daughter's son must have the same meaning as in sub-sect. 3, for by sub-sect. 5 the estate is to descend to a person adopted by the talookdar only in default of such son or descendants, viz., a daughter's son or his male lineal descendants. The 6th section says, in default of an adopted son the estate is to descend to the eldest and every other brother of the talookdar successively according to their respective seniority and their respective male lineal descendants. The words here should, in their Lordships' opinion, be held to have the same meaning as they have in sub-sects. 3 and 4. In sub-sect. 7 the words are, "in default of any such brother" to the widow, omitting "descendants"; but their Lordships cannot think it was intended by this omission to postpone the succession of male lineal descendants of brothers who died in the talookdar's lifetime till after the persons mentioned in sub-sects. 7, 8, 9, and 10, and only to allow such male lineal descendants to succeed under sub-sect. 11 according to the ordinary law to which the talookdar is subject. It is the reasonable construction that the brothers were intended to take in the same manner as sons. It therefore appears to their Lordships that the Plaintiff has no title to *Jehangirabad* or to the property which, by virtue of sect. 14, was subject to the same rules of succession.

This also disposes of the suit as regards the second class of property, which the Plaintiff claimed under the same title as the first class. It was objected by Mr. *Mayne*, on behalf of *Naushad Ali*, who claimed to be entitled to it under a codicil of the 1st of November, 1879, that the property was not proved to have been acquired according to sect. 14. The question does not appear to have been raised in the Lower Courts. Apparently it was assumed to be so acquired, possibly because it was known it could be proved by official documents, of which the Court was bound to take judicial notice. There is, indeed, some evidence of it in the

record, where there is what is called a list of villages held by *Naushad Ali Khan*, out of the villages purchased by Rajah *Farzand Ali Khan* from sanad-holding talookdars. The validity of the codicil was in issue, but there is no finding upon that in either of the Lower Courts. It would, however, be invalid as regards property acquired under sect. 14, for want of registration. But if this property is not within sect. 14, it is in the same condition as to succession as the property in classes 3 and 4. *Haidar Ali* claimed one-fourth of these classes, excluding heirlooms, as one of the heirs of *Farzand Ali*, according to the Mahomedan law, and alleged that the Defendants did not acquire any rights to it under the will of the 1st of November, 1879. This will has been found by both the Lower Courts to be genuine, and it excludes *Haidar Ali*. It is therefore an answer to his claim as heir.

But the Defendants also relied upon a custom of the *Skeikh Kidwai* tribe, to which the Rajahs *Razzas Baksh* and *Farzand Ali Khan* belonged, that sons, adopted sons, and daughters succeed in preference to and in exclusion of other heirs, by which the Plaintiffs' claim in opposition to *Zebunnissa*, the daughter, must fail. It was not disputed that the Rajahs belonged to that tribe. Both the Lower Courts have found that there is such a custom among the *Sheikh Kidwais*, and their Lordships see no reason in this case for departing from the settled practice of this Committee where there are concurrent judgments of the Courts below upon a question of fact. There is, therefore, a good defence to the whole of the Plaintiffs' claim, and the suit has been properly dismissed. Their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner which dismissed the appeal to him from the decree of the District Judge dismissing the suit, and to dismiss this appeal. The Appellants will pay the costs of it.

Solicitors for Appellants : *Barrow & Rogers.*

Solicitors for *Tassaduk* and *Zebunnissa* : *Watkins & Lattey.*

Solicitor for *Naushad Ali Khan* : *Solicitor, India Office.*

J. C.* MAHARAJA LUCHMESWAR SINGH . . PLAINTIFF;

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AND

March 12; *April* 25. THE CHAIRMAN OF THE DARBHANGA MUNICIPALITY . . . . . } DEFENDANT.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Land Acquisition Act*, 1870—*Lands of Minor—Power of Court of Wards.

Where land taken under the *Land Acquisition Act*, 1870, belonged to a minor under the care of the Court of Wards :—

***Held*, that the Court of Wards, being unable to give away the land of its ward, could not, by colourably accepting a merely nominal consideration, confer a valid title. Lawful possession could only be taken in strict and *bona fide* compliance with the provisions of the Act.**

APPEAL from a decree of the High Court (January 24, 1888), reversing a decree of the District Judge of *Mozufferpore* (September 1, 1886), and dismissing the Appellant's suit with costs.

The facts are stated in the judgment of their Lordships.

By his plaint the Appellant submitted that the transaction complained of was "simply a device resorted to for the purpose of evading the provisions of the *Court of Wards Act* (IV. (B. C.) of 1870) and the *Land Acquisition Act* (X of 1870), and under the circumstances was of no force or validity, and was in no way binding upon the Appellant." He prayed for recovery of possession of the land in suit, and for three years' mesne profits.

The Respondent filed a written statement in which he alleged that all proceedings were regularly taken under the *Land Acquisition Act* of 1870, and that the land was validly acquired by the Government of the *Darbhanga* Municipality. He set up the *Statute of Limitations*, and contended that the suit was not legally cognizable, being really brought to set aside the Collector's award.

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With regard to the question whether a legal title had been conferred on the Respondent, the District Judge held that Colonel *Burn*, the manager under the Court of Wards of the Appellant's property, could not give away the property under his management; that the transaction, though ostensibly a conveyance under the *Land Acquisition Act*, was in reality a gift. He therefore concluded that the transaction in question was illusory and void from its inception, and that the Appellant was entitled to the land with mesne profits, subject to paying the Respondent Rs.5000, which he had expended thereon.

The High Court in appeal agreed with the District Judge, that Colonel *Burn* could not give away the property of the ward, and that the transaction, so far as a rupee compensation was accepted, was really a gift. But it declined to adopt his conclusion that the proceeding was illusory and void from its inception. It pointed out that neither the Maharaja nor his manager could prevent the Government from taking the land when the proper notices were issued. "The proceedings were, both in substance and form, proceedings under the *Land Acquisition Act*, and all that was done by the guardian was to accept nominal compensation when he had a right to insist on substantial compensation." The Court then examined the proceedings in detail, and expressed its opinion that everything had been done under sects. 6, 9, and 15 to entitle the Collector to take possession; and that his action in doing so could not be reversed. "The question is not before us whether the Maharaja was or is entitled to claim compensation, or whether he was or is bound to accept nominal compensation. The question is one which was open to the District Judge on the reference, and, for aught I know, it may be open now." Finally, the Court held that the municipality was justified in using the land for any purpose for which the statute authorized its use, although not for the purpose for which it was professedly taken.

Cowie, Q. C., and *Branson*, contended that the proceedings which took place at the alleged transfer of title to the Respondent did not constitute either an award or reference under the *Land Acquisition Act*. The Court of Wards had no power to

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give away the property of the minor, and the minor's title had not been validly extinguished or transferred by proceedings under the Act. The transaction was wholly inoperative and void as against the Appellant.

Robinson, Q. C., and *Mayne*, contended that the High Court was right in holding that the land in dispute had finally vested by force of the statute in the municipality. If the compensation were inadequate, and if the Appellant had any remedy by suit in respect thereof, such suit would have been barred, and this suit was not framed to assert any such right. By sects. 35 and 38 of Act X of 1870, the whole proceeding became final by the decision of the Civil Judge, no appeal having been preferred therefrom.

Cowie, Q. C., replied.

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The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

The question in this appeal is, whether a piece of land, which was the property of the Appellant and is now in the possession of the *Darbhanga* Municipality, represented in the suit by their chairman, the Respondent, has been validly acquired by the municipality under the provisions of the *Land Acquisition Act*, 1870. On the 26th of August and the 2nd and 9th of September, 1874, a declaration was published in the *Calcutta Gazette*, in accordance with sect. 6 of the Act, that the land in question was required to be taken by Government, at the expense of the *Darbhanga* Municipality, for a public purpose, viz., construction of a public ghat or landing-place in the town of *Darbhanga*. At this time the Appellant was a minor, under the care of the Court of Wards of the Province of *Bengal*, and he remained a minor until the 25th of September, 1879. The Court of Wards for the district of *Darbhanga* was the Commissioner of *Patna*, and the representative of the Commissioner in *Darbhanga* was the Collector for the time being of *Darbhanga*, who was also *ex officio* Chairman of the *Darbhanga* Municipality. The Court of Wards has power to appoint a manager of the estate of a minor

who is under its care, and at this time the manager appointed was Colonel *J. Burn*.

On the 10th of May, 1875, the officiating Collector of *Darbhanga* wrote to the manager a letter, in which, after referring to a petition which had been presented by the manager's mokhtar, claiming rent for the land at the rate of Rs.16 5*a*. 3*p*. per annum, he says: "Permit me to invite your attention to the last clause of sect. 3 of the Act. From this it appears that you, as far as acquisition of land under this Act is concerned, are as competent to act for the minor Maharaja as he himself would be were he of age. This being so, I trust you will favour me with the expression of your consent to the sale of the land. The object in view is to benefit the town, and I am confident that this object will have weight with you in making your claim for compensation." The clause referred to says, under the description of persons deemed entitled to act: "The guardians of minors and the committees of lunatics or idiots shall be deemed respectively the persons so entitled to act to the same extent as the minors, lunatics, or idiots themselves, if free from disability, could have acted." These words must be read with reference to the obligations and duties of guardians and committees, which appear to have been entirely overlooked in this and his subsequent proceedings by the officiating Collector, who was the representative of the Court of Wards, the guardian of the minor. On the 12th of May, 1875, the manager wrote to the Collector: "Sir, with reference to your letter No. 49, of 10th instant, I have the honour to represent that, from the tenor of sect. 68 of Act IV of 1870 (B.C.), you will perceive that the Court of Wards has not power to alienate raj land except for the purposes mentioned in that section; but I beg the matter be submitted to the Court of Wards for orders. I have no objection to present the land in question to the town, but doubt my power to do so." The Collector appears to have written to the Commissioner of *Patna*, who represented the Court of Wards, on the 19th of May. This letter is not in the proceedings; but its contents may be inferred from the notice of it in the reply of the Commissioner on the 2nd of June. That is: "Sir, I have the honour to acknowledge the receipt of your letter, No. 62, dated the 19th

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ultimo, regarding the land belonging to the *Darbhanga* raj made over to the municipality free of cost, for the construction of a bathing ghat. In reply, I beg to state that Act X of 1870 came into force on the 1st of June, 1870, while Act IV (B.C.) of 1870, though it purports to have come into force on the same date, does not appear to have been sanctioned until the 17th of June, 1870. As regards the procedure to be observed in the case, you should offer the manager one rupee compensation, and allow the manager to refer the point to the Board of Revenue, with whose sanction the award can undoubtedly be accepted, and acceptance of the award will act as a valid conveyance." The words "made over to the municipality free of cost," in their Lordships' opinion, shew that the matter submitted to the Commissioners was the presenting the land to the town, which was in accordance with the manager's letter of the 12th of May. Their Lordships feel compelled to state their opinion that the direction or suggestion to offer one rupee compensation was a colourable way of doing indirectly what it was seen could not be done directly, viz., the guardian making a present to the town of the land of his ward.

The procedure referred to is contained in sects. 11 and 13 of the *Land Acquisition Act*. On a day fixed the Collector, who, after the declaration, is by sect. 7 to take order for the acquisition of the land, is to proceed to inquire summarily into the value of the land, and to determine the amount of compensation which, in his opinion, should be allowed for it, and to tender such amount to the persons interested. And in determining the amount of compensation, he is ordered to take into consideration the matters mentioned in sect. 24, one of which is the market value, at the time of awarding compensation, of the land. It is obvious that the offer of one rupee compensation was not in accordance with the duty of the Collector under these sections, and it would be altogether wrong to treat one rupee as the amount of compensation determined under sect. 13. Sect. 14 says that if the Collector and the persons interested agree as to the amount of compensation to be allowed, the Collector shall make an award under his hand for the same. This was never done. On the 14th of July, 1875, the Collector wrote to the

manager enclosing a copy of the Commissioner's letter, and saying, "I hereby offer you one rupee as compensation for the land in question, and request you to refer the point to the Court of Wards, with a view to obtaining sanction for the acceptance of the offer." Upon which, on the 16th of July, the manager wrote back to the Collector asking him to obtain the authority of the Board of Revenue to accept the one rupee as compensation. This letter appears to have been sent by the Collector to the Commissioner of *Patna*, and by him to the Board of Revenue. On the 4th of August, 1875, the officiating Secretary of the Board of Revenue wrote to the Commissioner that the member in charge had no objection to the manager of *Darbhanga* estate accepting the compensation of one rupee which had been awarded by the Collector of *Darbhanga* for the land belonging to the estate which had been taken up by the *Darbhanga* Municipality for the construction of a ghat on the *Bhagmata* river. On the 19th of August, 1875, the rupee was paid by the Collector, and the manager gave a receipt for it, describing it as a nominal compensation for the raj land taken up by the *Darbhanga* Municipality. The land was thereupon taken possession of by the municipality, a bathing ghat was erected upon a portion of it, and the rest has been used by the municipality as a market.

On the 11th of February, 1886, the Maharaja brought a suit to recover possession of the land, and for mesne profits and damages. The District Judge of *Mozufferpore*, on the 1st of September, 1886, made a decree in his favour, which has been reversed by the High Court, and the suit has been dismissed. Although the Court of Wards had not power to alienate the land for the purpose for which it was required, possession might have been lawfully taken of it if the provisions of the *Land Acquisition Act* had been complied with. But they were not. The Collector made no inquiry into the value of the land. He was the Chairman of the municipality, and his sole object appears to have been to benefit the town, forgetting that, as the representative of the Court of Wards, it was his duty to protect the interests of the minor, and to see that the provisions of the Act were complied with. It is not true, as the High Court seems to have thought,

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that, as the Maharaja, if he were of age, might waive the right to compensation, his guardian might do so. The Maharaja, if of age, might have made a present of the land to the town, and probably, if it was only to be used for a bathing ghat, would have done so ; but it was known by all parties that the manager had no power to do this. The offer and acceptance of the rupee was a colourable attempt to obtain a title under the *Land Acquisition Act* without paying for the land, and their Lordships have felt some surprise at the direction which originated it having come from the Commissioner. It is, however, to be observed that the letter of the 2nd of June is signed by a subordinate officer.

The 16th section of the Act says that when the Collector has made an award under sect. 14, or a reference to the Court under sect. 15, he may take possession of the land ; and it has been argued that there was a reference which authorized him to take possession although he had not made any award. This appears to have been the view of the High Court. Sect. 15 says that if the Collector considers that further inquiry as to the nature of the claim should be made by the Court, or if he is unable to agree with the persons interested as to the amount of compensation to be allowed, he shall refer the matter to the determination of the Court in manner after appearing. A reference to the Civil Court was made by the Collector on the 7th of February, 1876, months after the rupee had been paid and accepted. That acceptance as compensation is stated in the reference, and it is also stated that all the claimants for compensation except four had agreed to the Collector's award, and accepted the compensation tendered to them. Then facts are set forth as to the four claimants and the amounts of compensation tendered to them. The document then concludes : " As they have refused to accept this compensation, and as it appears to the officiating Collector that their claims are preposterously high and there is no chance of their coming to terms, the matter is referred to the District Judge for decision under sects. 15 and 18 of the *Land Acquisition Act*." This cannot be held to be a reference of a claim to compensation by the manager of the *Darbhanga* estate, his claim being treated as settled.

The claims of the four who had refused to accept the compensation tendered to them are the matter referred, and their Lordships can see no ground for the opinion of the High Court that on this reference the whole matter was open to the District Judge, and that "he could inquire, and possibly he did inquire, whether or not the consent was binding on the minor." The Collector had not said that an inquiry ought to be made, and there is no trace in the proceedings of the District Judge having made such an inquiry. Their Lordships are clearly of opinion that the reference had not the effect which has been given to it by the High Court, and that the decree reversing the decree of the District Judge cannot be supported. But the latter decree must be modified. The District Judge, in allowing mesne profits, has taken the income for the three years, 1883 to 1885, and has set that off against the Rs.5000 which it was admitted by the Plaintiff he was bound to pay to the Defendant for the money expended on the land. This income was received by the municipality after the expenditure of a considerable sum of money on the land. It is not the measure of the damages sustained by the Maharaja by being out of possession. The rent which could have been obtained for the land if the Maharaja had been in possession during those years is the fair measure of the mesne profits; and it appears from the Collector's letter of the 10th of May that the manager had claimed rent for the land at the rate of Rs.16 5*a*. 3*p*. per annum. Their Lordships, therefore, think that Rs.50 will be a proper sum to allow for mesne profits for the three years. That sum only must be deducted from the Rs.5000.

Their Lordships will therefore humbly advise Her Majesty to reverse the decrees of the High Court and the District Judge, and to make a decree that, on payment to the Defendant of Rs.4950, the Plaintiff recover possession of the land claimed in the plaint, and that he recover the costs of the suit in both the lower Courts. The Respondent will pay the costs of this appeal.

Solicitors for Appellant : *Sanderson, Holland, & Adkin.*

Solicitor for Respondent : *Treasure.*

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AND

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March 11. BHAGWAN DIN AND OTHERS . . . . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Law of Mortgage—Construction—Sale with Right of Repurchase.

Held, that according to the true construction of two documents they did not establish the relationship of mortgagor and mortgagee between the parties thereto, but purported to be and were in effect an absolute sale with a right to repurchase within ten years.

Alderson v. *White* (2 De G. & J. 105) approved, to the effect that, *prima facie*, an absolute conveyance containing nothing to shew that the relation of debtor and creditor is to exist between the parties does not cease to be a conveyance and become a mortgage because there is a right to repurchase.

APPEAL from a decree of the High Court (November 16, 1886), affirming a decree of the Subordinate Judge of *Cawnpore* (August 20, 1885).

The suit was brought by the Respondents to redeem certain property purchased by the Appellant in 1852, and alleged to have been assigned by way of conditional sale in 1835 by the predecessors in title of the Respondents to the predecessor of the Appellant. Both Courts found in favour of the right to redeem.

The Subordinate Judge held that the contemporaneous deed of agreement (which is sufficiently set out in their Lordships' judgment), was a genuine document, and that the Plaintiffs were entitled to redeem the mortgage on their paying the principal sum of Rs.4000. He was of opinion that the suit was not barred by limitation because mortgagors had sixty years within which they could claim redemption, under sect. 148, Sched. II of Act XV of 1877, that clause 134 of that Act, Sched. II, on which the Appellant relied, did not apply to this suit because in this case the transfer of the first mortgagee, *Ganga Din Dube's* interest, was made by auction sale. He rejected the contention

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that the purchasers *bona fide* considered that they were acquiring absolute interests in the subject of their purchase, and in support of that view he referred to the prices paid, and to the incumbrances being readily discoverable, the transfers having been by registered instruments.

The Defendant, the above Appellant, alone appealed to the High Court.

The learned Judges held that two authorities on which the Appellant relied, *Piarey Lal* v. *Saliga* (1), and *Kamal Singh* v. *Batul Fatima* (2), were not applicable to the present case. They referred to *Radhanath Das* v. *Gisborne* & *Co.* (3), which was a decision on sect. 5 of the old Limitation Act XIV of 1859, and said that in their opinion it could not have been intended that property which would pass on the sale by the mortgagee of his interest should come within the meaning of art. 134, that that article was meant to protect a purchaser *bona fide* believing on reasonable grounds that the vendor by the conveyance was conveying to him and had the power to do so an absolute interest.

They referred to sect. 29 of Regulation XI of 1822, which enacted that the purchaser in a case like the present bought only the right and interest possessed by the defaulter, and consequently *Sukh Din* obtained by his purchase only the interest of *Ganga Din Dube*, which was that of a mortgagee. That the purchasers must be presumed to have made inquiries; they were not innocent purchasers without notice, and if they assumed to purchase more than a mortgagee's interest they did not act in good faith.

Mayne, for the Appellant, contended that the suit should have been dismissed. He contended that the sale was absolute from the first, subject to a right to repurchase within a given time, which had expired. The relationship of debtor and creditor, of mortgagor and mortgagee, had not been created and did not exist. Regulation XVII of 1806 did not apply to the case. Mortgages by conditional sale are very different from the tran-

(1) Ind. Law Rep. 2 All. 394. (2) Ind. L. R. 2 All. 460.
(3) 14 Moore's Ind. Ap. Cas. p. 1.

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saction in this case. Conditional sales become absolute by the custom of the country when the time stipulated has expired; under the Regulation such sales are treated as redeemable mortgages provided the course prescribed by the regulation be followed. The Respondents did not pursue the course prescribed by either Regulation XVII of 1806 or Act IV of 1882. This, however, was not a mortgage at all, but an absolute sale. See *Fisher* on Mortgages (1).

[LORD MACNAGHTEN referred to *Alderson* v. *White* (2).]

C. W. Arathoon, for the Respondents, contended that the transaction was a mortgage, and that the right to redeem was not barred for sixty years. [He referred to *Macpherson* on Mortgages (3).]

[LORD MACNAGHTEN :—This is an absolute sale with a right to repurchase.]

[SIR B. PEACOCK :—This is not a conditional sale.]

But see *Radhanath Das* v. *Gisborne & Co.* (4). If it were a mortgage it would come within the regulation.

[SIR B. PEACOCK :—It is not a mortgage at all.]

Mayne was not heard in reply.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This case depends upon the construction of two documents dated the 20th of February, 1835. By the first document *Alum Singh* and others, who professed to be the proprietors of the property therein mentioned, declared that they had of their own accord absolutely sold the entire property to *Ganga Din* "in lieu of Rs.4000 of the current coin." That was an absolute sale by *Alum Singh* to *Ganga Din*. Then on the same day another document was executed by which *Ganga Din*, reciting the deed, says that he has purchased the property for the Rs.4000, and adds :— "However, I have as a matter of favour, mercy, kindness, and indulgence executed this deed, and do hereby stipulate that if all

(1) Page 8.
(2) 2 De G. & J. p. 105.
(3) Ed. 1868, p. 10.
(4) 14 Moore's Ind. Ap. Cas. p. 1.

these vendors will within a period of ten years from the date of this deed pay in a lump sum, and without interest, the whole amount specified above, I shall accept the same, and cancel this valid sale. During the aforesaid term I shall remain in possession, collect the rent, enjoy the profits, and be liable for loss; the vendors shall have no concern whatever; I shall not claim interest from the vendors, nor will they demand profits from me, after the expiry of the term. In case the whole of the principal is not paid"—and their Lordships think that the construction of that is, "In case the whole of the principal is not paid according to the terms of this document"—"the vendors shall not be able to cancel the sale by payment of the principal."

Those documents having been executed in 1835, in the year 1884—nearly fifty years afterwards—a suit is commenced by the Plaintiffs, representing the vendors, claiming to redeem the property upon payment of the Rs.4000. The Defendant in his written statement, in paragraph 3, says:—"An absolute sale deed was executed in respect of the property in suit in favour of *Ganga Din*, whose proprietary interests were then afterwards purchased at auction by *Sukh Din Bajpai*." Then he says, in paragraph 6: "Under the deed of agreement alleged by the Plaintiffs, they have no right of redemption by law," and in the last two lines of paragraph 9 he says: "The two parties neither stood, nor do now anyhow stand, in the relation of mortgagor and mortgagee."

The first Court having held that the parties did stand in the relation of mortgagor and mortgagee, and having decreed that the Plaintiffs were entitled to redeem, an appeal was preferred to the High Court, and the third ground of appeal is thus stated: "Because under the terms of the agreement the Plaintiffs cannot now sue to redeem the property in suit." The High Court, upon the hearing of the appeal, affirmed the decision of the lower Court, and held that the parties stood in the relation to each other of mortgagor and mortgagee, and not in the relation of one being an absolute vendee with the right given to the vendors to repurchase within a period of ten years upon repayment of the full amount of the purchase money. It does seem contrary to all principles of equity and good conscience that when it was

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stipulated that the money should be repaid within the period of ten years from 1835 the representatives of the vendors could lie by until the year 1884 and then claim that they had a right which was not barred by limitation to redeem that which they call a mortgage at any time within the period of sixty years. That this was not a mortgage, at any rate according to English law, seems clear from the decision of Lord Chancellor *Cranworth* in the case of *Alderson* v. *White* (1). In giving judgment the Lord Chancellor says this : " These deeds taken together do not on the face of them constitute a mortgage ; and the onlv question is whether, assuming the transaction to be a legal one, it has been shewn to be in truth such as in the view of a Court of Equity ought to be treated as a mortgage transaction. The rule of law on this subject is one dictated by common sense—that *prima facie* an absolute conveyance containing nothing to shew that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase." In this case the vendors did not stipulate that they should have a right to repurchase ; but the vendee, as a matter of grace and kindness, stipulated that they should have that right. The Lord Chancellor proceeded : " In every such case the question is, what upon a fair construction is the meaning of the instruments ? Here the first instrument was on the face of it an absolute conveyance ; the second gave a right to repurchase on payment, not of what should be due, but of the full amount of the purchase money of £4739 "—exactly corresponding to the terms of the two documents in the present case, whereby the vendee gave the right to the vendors to take back the property if within the period of ten years they should pay the same amount, namely, Rs.4000. " Was that, if taken according to its terms, a lawful contract ? Clearly so. What then is there to shew that it was intended to be a mere mortgage ? I think that the Court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be ; and I see but little evidence to that effect here." That passage was approved of in *Manchester, Sheffield, and Lin-*

(1) 2 De. G. & J. p. 105.

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colnshire Railway Company v. *North Central Wagon Company*(1). It is clear that this case was not one of mortgagor and mortgagee, but one of an absolute sale with a right to repurchase within a period of ten years.

Under these circumstances, their Lordships think that the decision of the High Court ought to be reversed, and that their Lordships ought to give the judgment which the High Court ought to have given, namely, to reverse the decision of the first Court, and to dismiss the suit with costs in both Courts.

Their Lordships will humbly advise Her Majesty to that effect.

The Respondents must pay the costs of this appeal.

Solicitors for the Appellant : *Barrow & Rogers.*

Solicitors for the Respondents : *T. L. Wilson & Co.*

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SHRI KALYANRAIJI AND ANOTHER . . PLAINTIFFS ;

AND

THE MOFUSSIL COMPANY, LIMITED, AND OTHERS . . . . . } DEFENDANTS.

(CONSOLIDATED APPEALS.)

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Act XIX of 1844—*Construction—Abolition of Cesses—Lago.*

Act XIX of 1844, abolished cesses of every kind on trades and professions under whatsoever name levied within the Presidency of *Bombay.* It therefore abolished a lago or tax of two annas per bale on all cotton bought in and exported from *Broach*, which lago had belonged as of right from time immemorial to the Appellants.

CONSOLIDATED APPEALS from two decrees of the High Court (April 28, 1884) affirming two decrees of the Senior Assistant Judge of *Broach* (Oct. 23, 1882) which had reversed decrees of the Subordinate Judge of *Broach.*

* *Present* :—LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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(1) 13 App. Cas. p. 568.

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The suits were brought by the Maharaj as proprietor of a temple called *Shriji* in *Broach* to enforce payment of a tax on all dealings in cotton or cotton seeds carried on by the Defendants, who were European merchants trading in *Broach*.

As regards cotton seeds, his claim was rejected by all three Courts. As regards cotton, his claim was allowed by the first Court, but rejected by the two Courts of Appeal.

The facts are stated in the judgment of their Lordships.

Finlay, Q. C., and *C. W. Arathoon*, for the Appellants.

Doyne and *Mayne* for the Respondents.

[The following cases were referred to: *Umedsanji* v. *The Collector of Surat* (1); *Nasarvanji Pestanji* v. *The Deputy Commissioner of Customs* (2).]

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

The late Appellant, who was Plaintiff in the two suits which have been consolidated, was the managing proprietor of a temple in *Broach*, known as the *Shriji Mandir*. In that capacity he claimed to be entitled to a lago, or perquisite or tax, of two annas per bale on all cotton bought in and exported from *Broach*. The present Appellants are his representatives.

It must be taken for the purposes of this case that from time immemorial, before and up to the year 1844, this lago was claimed and received as of right by the managing proprietor of the temple for the time being, and it may be assumed that the claim had a legal origin, and that, but for an Act of the Legislature passed in 1844, it would still be enforceable in a court of law.

The Act on which the question turns is Act XIX of 1844. It is in these terms:—

"It is hereby enacted that from the 1st day of October, 1844, all town duties, kusab veeras, mohtarfas, ballootie taxes, and cesses of every kind on trades and professions under whatsoever

(1) 7 Bomb. H. C. R. A. C. J. 50. (2) 2 Bomb H. C. R. 75.

name levied within the Presidency of *Bombay*, and not forming a part of the land revenue, shall be abolished."

There was an earlier Act, No. XX of 1839, to which reference was made during the argument. It empowered the Governor in Council of *Bombay* to issue orders prohibiting the levy of hucks and fees of every description, and customs, whether by land or sea, enjoyed by holders of rent-free lands or other persons. Orders so issued were not to be questioned, and persons levying any prohibited hucks or fees were to be punishable for undue exaction as if they had been revenue officers guilty of extortion. No order, however, under this Act affecting the question raised in the present case was issued, at any rate before the passing of the Act of 1844. The Act of 1839 was referred to mainly for the purpose of showing that the abolition of hucks and fees without compensation was not inconsistent with the course of legislation in *India* at that time.

In dealing with the Act of 1844 it was contended by Mr. *Finlay* that the lago now in question does not come under the head of "town duties." In this their Lordships are disposed to agree, although it seems clear that the expression is not to be confined to duties "appropriated by law or custom to municipal purposes" (to use the words of a Government proclamation of the 7th of September, 1844, which was referred to during the argument), but extends to duties or cesses on goods brought into or carried out of a town, although levied by private persons. The learned Counsel for the Appellants then proceeded to point out that the expression "kusab veera" or kasab vero, is explained in *Wilson's* Glossary to be "a tax on occupations and crafts," and that, according to the same authority, "mohtarfa" seems to be a poll tax, while a "ballootie tax" or a "balute-patti" is defined to be "a cess or tax upon the shares or claims of village servants;" and he argued that the expression "cesses on trades and professions," having regard to the expressions found in the immediate context, ought to be confined to cesses in the nature of license duties for carrying on trades or professions.

Owing to its brevity the Act is not free from obscurity. But their Lordships think that there is no sufficient reason for giving the expression "cesses on trades and professions" the restricted

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meaning to which the Appellants desire to confine it. The Act abolishes cesses " of every kind" on trades "under whatever name levied." The Appellants would limit the abolition to one kind and one kind only. Is this lago a cess or tax on a trade ? Mr. *Finlay* argued that though it was a tax affecting trade it could not fairly be described as a cess upon a trade. Their Lordships, however, think that it properly comes within that description. It is a cess of a mixed kind, local and indirect, upon a particular trade—the trade of a cotton buyer carried on in *Broach*—attaching when the article of merchandise in which the trader deals is bought in *Broach* and exported from *Broach*.

Upon the main point, therefore, their Lordships are of opinion that the appeal fails.

It was then said that, although the Act of 1844 may have done away with the lago as an impost capable of being enforced in a court of law, yet such a payment was not thereby made illegal, and it was urged that, by virtue of some thing loosely described as "an understanding," the buyers of cotton in *Broach* had come under some sort of obligation in the nature of a trust which made them liable as trustees or agents to the claim of the Plaintiff.

It seems to have been the practice for the native cultivators selling cotton in *Broach* to allow a walthar or rebate of one rupee for every candy or two bales. There can be no doubt that this walthar was originally intended to meet or cover certain charges or allowances of which the Mandir's lago was one ; and it was said on behalf of the Appellants that the native cultivators would naturally be disposed to take this burthen on themselves because they were interested in maintaining the worship of *Shriji*. From these premises it was argued that the Plaintiff was entitled to enforce his claim directly against the cotton buyers as his trustees, or as having received moneys for his use, for which they were accountable to him. The Subordinate Judge accepted this view. The District Judge of *Broach* and the Division Bench at *Bombay* rejected it, but apparently upon the ground that payment of the lago was prohibited by the Act of 1844, and therefore illegal, and that the Court would not be instrumental in carrying out a contract designed to defeat the intention of the Legislature. The Act, however, simply abolished cesses on trades. If the parties who

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before the Act were legally liable to the payment had chosen to continue it afterwards as a voluntary contribution, they would have been quite at liberty to do so. The real answer to this part of the argument is that there is nothing whatever in the nature of a trust to be found in the transaction or to be inferred from the course of business. There is not the slightest evidence that the Respondents accepted the position of trustees for the Plaintiff, or consented to receive moneys for his use. The cotton sellers may or may not have a valid claim against the cotton buyers in respect of so much of the walthar as may appear to be attributable to or connected with the lago, but such claim, if valid, cannot give any right to the representatives of the Plaintiff against persons who undertook no obligation towards the Plaintiff.

Their Lordships, therefore, will humbly advise Her Majesty that these appeals ought to be dismissed.

The Appellants will pay the costs of the appeals.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondents: *Payne & Lattey.*

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March 13.

RANI PIRTHI PAL KUNWAR . . . . PLAINTIFF;

AND

RANI GUMAN KUNWAR AND ANOTHER . . DEFENDANTS.

ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.

Practice—Right to a declaratory Decree—Discretion of the Court.

Where the only object of a declaratory suit was to prevent the Defendant who claimed property under an alleged adoption and alienation from obtaining possession after the Plaintiff's death :—

Held, that it was properly dismissed.

APPEAL from a decree of the Judicial Commissioner (July 27, 1885), reversing a decree of the District Judge of *Sitapur* (July 27, 1885).

The suit was brought by the Appellant, for a declaration that

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the adoption of the second Defendant by the first Defendant was invalid, and that a proposed transfer to him of certain property was ineffectual. A declaratory decree was pronounced by the District Judge, but was set aside by the Judicial Commissioner, on the ground that under the circumstances of the case it was not advisable to make any declaratory decree.

The facts of the case are these :—*Raja Ratan Singh* died about 1837, leaving a son *Raja Sheo Bakhsh* and a widow, the first Respondent. *Raja Sheo Bakhsh* died subsequent to June 1864, having, as alleged by the Appellant, made a provision for life for the maintenance of the first Respondent.

On the 14th of December, 1883, the first Respondent executed a document whereby she recited that she had adopted the second Respondent and bequeathed to him all her estate, moveable and immoveable. The Appellant, who is the widow of *Raja Sheo Bakhsh Singh*, shortly afterwards sued to have it declared that this adoption and alienation were invalid, with the result above mentioned.

Mayne, for the Appellant, contended that the decree of the first Court was lawful and made in the sound exercise of judicial discretion. He cited *Thayammal* v. *Venkatarama Aiyar* (1); *Jagadamba Chowdhrani* v. *Dakhina Mohun* (2); *Sree Narain Mitter* v. *Sree Mutty Kishen Soondory Dassee* (3).

The Respondents did not appear.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

The circumstances of this case are very fully stated by the Judicial Commissioner in his judgment, and their Lordships have very few remarks to make beyond those which the Judicial Commissioner made when he delivered that judgment. He referred to the case of *Sree Narain Mitter* v. *Sree Mutty Kishen Soondory Dassee* (3), and read the remarks which had been made by the Judicial Committee in that case. Amongst those remarks it was said : "It is not a matter of absolute right to obtain a declaratory

(1) Law Rep. 14 Ind. Ap. 67.
(2) Law Rep. 13 Ind. Ap. 84.
(3) Law Rep. Ind. Ap. (Suppl.) 149 ; S. C., 11 Beng. L. R. 190.

decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under the circumstances of the case to grant the relief prayed for. There is so much more danger than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation."

The Judicial Commissioner, in exercising that judgment which the Judicial Committee had suggested ought to be adopted by the Courts in India, thought that this was not a case in which, in the exercise of a sound judicial discretion, he ought to grant a declaratory decree, or that a declaratory decree ought to have been granted by the Court of First Instance, and he therefore reversed the decision of that Court and refused a declaratory decree. It appears to their Lordships that the Judicial Commissioner exercised a very sound judgment in what he did. All that is suggested by the learned counsel on the part of the Appellant in support of a declaratory decree is this: that at some time or other after the death of the present Plaintiff, the person who according to the Plaintiff's contention is not an adopted son may by some means, either by an act of the Government or otherwise, obtain possession as an adopted son. The only object therefore of having a declaratory decree is to prevent him being put into possession. Their Lordships cannot assume that the Government, if petitioned to put the person claiming to be an adopted son into possession would do so unless they saw that he had a right to that possession. The officers of Government would in ordinary course, if there were any doubts as to the title, refer the parties to the Civil Court.

If the person claiming to have been adopted brings an action to enforce his title, the question will be investigated whether he was validly adopted or not.

Under these circumstances, their Lordships think that there was no ground for this appeal, and they will humbly advise Her Majesty that the judgment of the Judicial Commissioner be affirmed.

Solicitors for Appellant: *T. L. Wilson & Co.*

J. C.* 1890 — *Feb.* 14, 15, 18, 20; *April* 25.

ROBERT WATSON & CO. . . . . DEFENDANTS;

AND

RAM CHAND DUTT AND OTHERS . . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Land tenure in Bengal—Tenants in Common—Right of each Tenant in Common to Cultivate—Injunction.

Where an estate in *Bengal* was held by Plaintiffs and Defendants as tenants in common, and Defendants were in actual occupation and cultivation of part of such estate as if it were their own separate property; and it appeared that the Defendants had resisted the Plaintiffs' entry upon such part, not in denial of their title, but to protect such cultivation from wilful interference, such resistance does not entitle the Plaintiffs to a decree for joint possession, or to an injunction.

Where no specific rule exists, the Courts are to act under the *Bengal* regulations—according to justice, equity and good conscience. Consistently with that rule one tenant in common cannot be restrained from cultivating a portion of the lands not actually used by another, nor can one tenant in common be allowed to appropriate to himself the fruits of another's labour or capital.

APPEAL from a decree of the High Court (Feb. 15, 1887) by which, on the appeal and cross-appeal of the parties, a decree of the District Judge of *Midnapore* (Jan. 4, 1886) was modified.

The principal question of law decided in this appeal was as to the rights of tenants in common, *inter se*, to cultivate or restrain the cultivation of lands in *Bengal*, so held in a tenancy in common.

The facts and proceedings are stated in the judgment of their Lordships.

Upon the question just stated the District Judge held as follows:—

Having given the best attention I was capable of to the circumstances of the case and the respective positions of the parties, I have come to the conclusion that Plaintiffs are entitled to the remedy which they seek. The weight of legal precedent seems

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entirely in their favour, and although I admit that the decision may involve some hardships upon the Defendants, still, as was observed in *Lloyd* v. *Mussamut Bibee Sogra* (1), this is a misfortune inseparable from a tenure of this description. There are some equities in their favour. They have gone to expense in the erection of factories, &c.; but it must be presumed that they have already enjoyed a considerable profit from the indigo which they were enabled to manufacture during the term of their lease and since. Besides, a continuance of the present state of things would give them all the benefit derivable from the available khas lands, while Plaintiffs would get none except by the tedious and uncertain process of endeavouring to bring the rest of the cultivated khas lands under rent (in which, as I have said, their success would seem to be problematical), or else by going to the expense of preparing and bringing under cultivation that portion of the khas lands which is not at present under cultivation, but which might be capable of it. It is a pity that the parties have not been able to come to an amicable arrangement among themselves; but as they have not done so, their conflicting claims must be decided by legal tests, and in my opinion the Plaintiffs have the law (and by this, I do not mean law as contrasted with equity) in their favour.

He accordingly held the Plaintiffs to be entitled to the injunction sought in the plaint, *i.e.*, a permanent injunction prohibiting the Defendants from sowing indigo, and from allowing anybody else to do so without the Plaintiffs' consent.

The declaratory part of his decree was that the Plaintiffs' interest in the 4128 bighas of land cultivated by the *Watsons* with indigo was two-thirds of 14 annas, that they were entitled to joint possession with the *Watsons* of those lands, and also to their similar proportion of the rent of those lands calculated at 8 annas per bigha.

In appeal the High Court declared the right of the Plaintiffs to joint possession of the entire 14 annas of the khas lands, and a similar proportion of rent at 8 annas per bigha, and granted an injunction restraining the *Watsons* from excluding the Plaintiffs by any means from their enjoyment of the joint possession of

(1) 25 Suth. W. R. 313.

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those lands, and from taking, retaining, or giving to others exclusive possession thereof as against the Plaintiffs. Upon the question of remedy by injunction the High Court expressed themselves as follows :—

"But the real question as to the remedy is, whether or not the injunction, which has been granted, can be sustained ; or if that injunction cannot be sustained, whether any narrower injunction ought to be granted. Each side in argument before us took rather extreme grounds. It was contended on one side, that one co-sharer has an absolute right, as a general rule of law, to say to his co-sharer, 'You shall not cultivate that land in any way without my consent,' and to enforce that right, at least in the absence of any special circumstances, by claiming an injunction in a Court of law. It was contended, on the other side, that an injunction between co-sharers is a thing which either ought never to be granted, or at any rate only under very unusual circumstances.

"We are not prepared, and it is not necessary to agree, as at present advised, with either of these propositions.

"The proposition contended for by the Plaintiffs has for its support the language of some learned Judges of this Court, in delivering judgment upon cases before them. We think it right only to say this, that we think it may well be open to consideration in a future case whether the expressions used in some of those cases, if taken as qualified propositions of law and without regard to context, are wholly correct.

With regard to the extreme proposition on the other side, it is based upon the construction which the learned counsel placed upon English decisions. But though, of course, the principles on which English Courts administer the remedy by injunction must be taken to be those which the legislature meant to affirm in the *Specific Relief Act*, still the circumstances of this country ary very different from those of *England*, and it would be a dangerous thing to assume that, because the Courts in *England* have very rarely found it necessary to grant an injunction as between co-sharers, in order to prevent multiplicity of suits or upon any other grounds, Courts of this country may not properly be somewhat less rigid in doing so. The circumstances of the

country are different, the positions of co-sharers and persons with partial interests in land are very different from those in *England*; and the interests of part-owners may here require protection by injunction in classes of cases in which it is not necessary to grant it in *England*. There is a large number of cases which go to shew that the remedy by injunction may in this country be given in cases between co-sharers, when the circumstances of the case are such as to render it necessary, in order to secure those objects which, according to the law, should be secured by injunction. Particularly, since the passing of the *Specific Relief Act*, an injunction may properly be granted if, on a consideration of the facts of the case, the Court thinks that that remedy is necessary in order to prevent repetition of injury and multiplicity of suits.

"In the present case, we are to consider what injunction ought to be granted, if any. The injunction asked for was two-fold: first, an injunction against growing indigo, and, secondly, an injunction against doing anything which should exclude the Plaintiffs from their right to ijmali enjoyment of their shares in the lands.

"The injunction which has been granted corresponds with the first part of the prayer. It is not necessary in this case to decide whether there could in any case properly be an injunction, a simple and unqualified injunction against the growing of indigo by one co-sharer of land. It is unnecessary to consider that question, because there are circumstances in this case which would lead us to say that, at any rate, such an injunction ought not to be granted in this case. These are the circumstances: first, the Defendants, Messrs. *Watson*, are owners of indigo factories as well as occupiers of these indigo lands; and those factories have been built under arrangements with the same persons by or from whom the parties to this suit all derive their title, and the interests which they have in mouzah Silda have been expressly given them for the purposes of working their factories and growing indigo. Not only is that the case, but the lands now in question appear on the evidence to have been waste lands, and brought under cultivation by Messrs. *Watson* as indigo lands. They have not been used in any other way. Under these

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circumstances, we think we ought not to issue an injunction restraining them absolutely from growing indigo upon these or upon any particular lands, provided Messrs. *Watson* can—and it is for them to find out how they can—grow indigo without excluding the Plaintiffs from their equal rights as co-sharers.

"But we think that a narrower injunction under the circumstances of the case ought to be granted. This is a case in which there has been a continued wrong, and a wrong which the Defendants have attempted to justify. A continuance of that wrong and a multiplicity of suits seem to us not only highly probable, but almost certain, if we were simply to set aside the injunction. We think the proper course will be to vary the injunction, and to make it accord with that given in so many cases in this Court, by making it an injunction restraining the Defendants from excluding by any means the Plaintiffs from their enjoyment of the ijmali possession of the lands in this suit. The injunction will be in the form given in 25 Suth. W. R. 313."

Sir *Horace Davey*, Q. C., and *Doyne*, for the Appellants, admitted that the Respondents were entitled to joint possession of two-thirds of 14 annas of Silda. But they contended that the Respondents had no right to the share which was *Pudma Lochun's* in the 12-anna putni estate. For although *Pudma Lochun* executed the two deeds of endowment, they were never acted on or given effect to by him or by the Respondents; on the contrary, they contended that notwithstanding the deeds the Appellants derived title from him to his share. Similarly with regard to *Pudma Lochun's* one-third share in the 2 annas of mowrussi-mokurruri interest acquired by the joint family in the name of *Ram Chand Dutt* on the 20th of January, 1879. On the question of law they contended that the Respondents were not entitled as joint proprietors to damages or to an injunction restraining the Appellants, who were admittedly joint as to 2 annas, and claimed a larger interest from cultivating with indigo an area of khas lands concurrently found by the Courts below to be only 4120 bighas. The entire area of the khas lands was of great extent. That held by the Respondents was also of considerable extent. It

was undesirable that claims of the kind set up by the Respondents, and cross claims by the Appellants to which they would give rise should be entertained by the Courts. It would prevent all cultivation, and would be contrary to public policy. A tenant in common had by English law the right to demand a partition. This was the only remedy if at all open to the Respondents. An injunction is never granted as between tenants in common; and there is no authority for the injunction granted in this case.

Finlay, Q. C., and *Branson*, for the Respondents, after argument as to the extent of the Respondents' interest in the land, contended that the action of the *Watsons* amounted to an actual ouster of them from the land on which the indigo was grown. Consequently they were entitled to an action either of ejectment or trespass, and where either of those actions was maintainable the Court would grant an injunction. Reference was made to *Co. Litt.*, Tenants in Common, sects. 322 and 323. The Appellants claim exclusive possession of a part, thereby ousting the Respondents from joint enjoyment with them. It was denied that they had any right of exclusive enjoyment: See *Stalkartt* v. *Gopal Panday* (1); *Lowndes* v. *Bettle* (2). [SIR R. COUCH referred to *Crowdee* v. *Bhekdari Sing* (3).] See also *Lloyd* v. *Mussamut Bibee Sogra* (4); *Specific Relief Act* I of 1877, c. 10; *Curtis* v. *Price* (5); *Bessey* v. *Windham* (6). A right to an injunction in such cases as this has been recognised since 1856. The first case is *Jankee Singh* v. *Bukhooree Singh* (7); see also *Rajendro Lall Gossami* v. *Shamachurn Lahori* (8). [SIR BARNES PEACOCK:—English law does not apply to this case. If there is no specific rule, the case must be decided according to justice, equity, and good conscience.] Reference was made to *Goodson* v. *Richardson* (9).

Doyne, replied.

(1) 12 Beng. L. R. 197, 199.
(2) 10 Jur. (N. S.) 226.
(3) 8 Beng. L R. App. 45.
(4) 25 Suth. W. R. 313.
(5) 12 Ves. 89, 103.
(6) 6 Q. B. 166.
(7) S. D. A. (1856) p. 761.
(8) Ind. L. R. 5 Calc 188.
(9) Law Rep. 9 Ch. 221.

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1890. April 25. The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

Gungaram Dutt, *Ram Chand Dutt*, and *Pudma Lochun Dutt* were brothers, and constituted a Hindu family joint in estate. They also carried on business as money lenders.

In the year 1877 *Pudma Lochun* executed two deeds of endowment, or nirdes patras, one on the 24th of July and the other on the 12th of December. On the former of those dates the three brothers were entitled to a 12-anna share or twelve-sixteenths of pergunnah Silda in zillah *Midnapore*, which they held under three putni bynama patras ; the first for a 4-anna share, dated the 29th Srabun, 1268, and registered on the 20th of August, 1861, the second dated the 3rd Cheyt, 1276, Amli, corresponding with the 14th of March, 1869, for a 6-anna share, and the third, dated 13th Kartick, 1283, for a 2-anna share.

The property was subject to the ordinary law of *Bengal*, according to which upon the death of any one of the brothers the share of the joint property to which at the time of his death he might be entitled would descend to his heirs. *Pudma Lochun* had no son ; but in 1877, at the time of the execution of the deed of the 24th of July, he had a wife, a daughter, *Bama Soondari Dasi*, one of the Appellants, and a grandson, the only son of that daughter. His wife died in his lifetime, between the dates of the two deeds. He himself died on the 26th of October, 1879, and upon his death his daughter was his heiress. The *Watsons*, Appellants, claim through her. It is contended on behalf of the Respondents that *Pudma Lochun* divested himself of his one-third of the 12-anna share held in putni by the deeds of endowment executed by him.

It is not necessary to review the evidence in detail. It was carefully considered by the District Judge. It seems clear that from the time of the execution of the deed of the 24th of July, 1877, until after the death of *Pudma Lochun*, a period of about three years and three months, no change took place in the accounts, or in the management, or of dealing with the business or estates, or the proceeds thereof. Mortgages were executed, in

which *Pudma Lochun* joined, and everything appears to have gone on in the same manner as if the deeds had never been executed, except that the family idol was removed from the house of *Gungaram* to that of *Pudma Lochun*. No act was done by *Pudma Lochun* or his brothers in which he was described as *Shebait*.

Their Lordships concur generally with the District Judge in his findings of fact, and they are of opinion that it was not the intention of *Pudma Lochun* or of his brothers that the deeds should be acted upon, or that *Pudma Lochun* should thereby divest himself of his share of the property. The deeds were merely fictitious, or benami.

In arriving at that conclusion their Lordships agree with the District Judge that the deed of the 24th of July did not profess to postpone any of its avowed objects until the death of *Pudma Lochun*, or to any period subsequent to the execution of the document, except in so far as it related to the allowance to *Bama Soondari*, or her son *Upendra Nath*. They cannot concur with the High Court that the provisions relating to that allowance were the chief provisions of the deed, or that the deed purported on the face of it to postpone the gift so far as it related to religious objects to any future period.

It was strongly urged on behalf of the Plaintiffs on the argument of the appeal that the receipt by *Bama Soondari*, after her father's death, of three monthly payments of the allowance provided for her by the deed was inconsistent with the fact that the deeds were not intended to take effect; but their Lordships do not attach much importance to those receipts. *Bama Soondari* was a widow, maintained by and residing in one of the houses which formed part of the estate; she had apparently no means for embarking in litigation; she was then, so far as it appears, living on friendly terms with her uncles, and if she had not at that time received the allowance which on the face of the deeds was provided for her she probably would have received nothing.

After the execution of the deeds of endowment, and during the lifetime of *Pudma Lochun*, a mowrussi istimrari moqurruri pottah of another 2-anna share of *Silda* was granted to *Ram Chand* in consideration of the sum of Rs.25,000.

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It having been considered that *Pudma Lochun* did not by the deeds of endowment divest himself of any part of the joint family property, the mokurruri pottah must be assumed to have been purchased with funds of the joint family, and to have enured for the benefit of the three brothers.

From the facts above stated it appears that at the time of his death *Pudma Lochun* was entitled to a one-third undivided share of a 14-annas or fourteen-sixteenths share of *Silda*, of which twelve-sixteenths were held by the three brothers in putni, and two-sixteenths under the mokurruri pottah; that the other two brothers were entitled to the other two-thirds thereof; and that the interest of *Pudma Lochun* descended upon his death to his daughter *Bama Soondari*. Out of her interest in the putnis *Bama Soondari*, on the 6th Assin, 1292, after the commencement of the suit, granted a dur putni to *Bhola Nath Dhur*, who on the 5th of November, 1884, granted a se putni to the *Watson* Defendants.

Their Lordships are of opinion that at the date of suit the interest of the Plaintiffs in the lands in suit was only two undivided third parts of an undivided share of 14 annas or of fourteen-sixteenths of *Silda*; that *Bama Soondari* was at that time entitled to the other undivided third part thereof.

At the time of the death of *Pudma* the *Watsons* held the 14-annas share which belonged to the three brothers *Dutt* under leases, in respect whereof they paid rent to the *Dutt* brothers, and which leases expired on 31st Bhadro, 1290, Amli, corresponding with the 14th of September, 1883. After the expiration of the leases the *Watsons*, who were entitled to the remaining 2-annas undivided share of *Silda* under an ijara pottah from *Rani Doorga Kumari Debi*, of the 6th Bysack, 1290, Amli, corresponding with the 17th of April, 1883, continued in possession of that portion of *Silda* which comes under the head of khas, and to cultivate and sow it with indigo as they had done during the continuance of the leases. Their Lordships cannot, upon the evidence, say that that was such an improper course of cultivation or use of the land as to render an injunction the proper remedy.

The Plaintiffs endeavoured to sow oil-seeds, and to prevent the *Watson* Defendants from continuing the cultivation in which

they were engaged; the *Watson* Defendants persisted in the cultivation which they had commenced; quarrels and even riots ensued, and the Plaintiffs commenced the suit in which the appeals have been preferred. They prayed to be put into ijmali possession of their 14-annas share, to have damages awarded to them at the rate of eight annas per bigha on 6894 bighas, and similar damages until they should be put into possession, also for a permanent injunction prohibiting the Defendants from sowing indigo, and from allowing anybody else to do so without the consent of the Plaintiffs, and from throwing any obstacles in the way of the Plaintiffs' holding ijmali possession.

The 6th issue laid down for trial was, "What is the extent of the Plaintiffs' interest in the land in suit?" Upon this the District Judge held that the Plaintiffs were entitled to two-thirds of the 14-annas share of the khas lands of *Silda* specified in the decree, and to get joint possession of the same with the *Watson* Defendants. The High Court, on the contrary, having arrived at the conclusion that the deeds of endowment were intended to take effect, that *Pudma* thereby divested himself of his interest in the property, and that no part of it descended to his daughter *Bama Soondari*, held that the Plaintiffs were entitled to the whole of the 14-annas share.

The decree of the District Judge, after reciting the claim, and specifying the lands included in the 6824 b., proceeded amongst other things as follows:—

"That a decree be passed in the following manner:—That by reducing the quantity of land claimed, viz., 6894 bighas to 4128 bighas, the Plaintiffs' right is established to a two-thirds share of the 14 annas, and the Plaintiffs are entitled to get joint possession of the same with Defendants No. 1 (that is the *Watsons*); and that on payment of excess Court fees proportioned to the excess of amount found due over the valuation of the plaint, calculated at the rate of 8 annas per bigha of the decreed lands from the beginning of 1291 Amli until the date of possession, the Plaintiffs shall get two-thirds of 14-annas share in accordance with the decision of the 6th issue. The Court further directs that an order of injunction be issued to the Defendants No. 1, prohibiting them from either themselves or through others

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sowing indigo on those khas lands of *Silda*, on which indigo is being now grown."

The High Court modified that decree, and ordered that, instead of a two-thirds share of 14 annas of the khas lands of *Silda*, the Plaintiffs were entitled to get joint possession with the Defendants the *Watsons* of the entire 14 annas of the said lands; they increased the amount of compensation accordingly, and varied the injunction granted by the District Judge.

Their Lordships are of opinion that the judgment and decree of the High Court are erroneous and ought to be reversed, with costs, and that the decree of the District Judge ought to be modified and partly reversed. It was contended on the part of the Respondents, that the acts of the *Watsons* amounted to what in *England* is called an actual ouster, and that the Plaintiffs were entitled to a decree ordering them to be put into ijmali possession with the Defendants; but it appears to their Lordships that the Plaintiffs have not established a right to have such a decree; and for the same reason they think that so much of the decree of the District Court as declares that they are entitled to get joint possession ought to be reversed. It seems to their Lordships that if there be two or more tenants in common, and one (*A.*) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant in common (*B.*) attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which *A.* is engaged, and the profitable use by him of the said part, and *A.* resists and prevents such entry, not in denial of *B.'s* title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of *A.* would not entitle *B.* to a decree for joint possession. Their Lordships are further of opinion that the decree of the District Judge, so far as it orders an injunction to be issued, ought to be reversed. It appears to their Lordships that, in a case like the present, an injunction is not the proper remedy. In *India* a large proportion of the lands, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of

the estate in a proper and husbandlike manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected—a work which, in ordinary course, in large estates would probably occupy a period including many seasons. In such a case, in a climate like that of *India*, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In *Bengal* the courts of justice, in cases where no specific rule exists, are to act according to justice, equity, and good conscience, and if, in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital.

Upon the whole, their Lordships will humbly advise Her Majesty to reverse the decree of the High Court, and to order the Plaintiffs, Respondents, to pay the costs incurred by the Defendants in that Court. And further, to declare that the Plaintiffs, Respondents, are entitled to only two-thirds of 14 annas, or of fourteen-sixteenths of the khas land, or, in other words, to two-thirds of seven-eighths of the 4128 bighas, the quantity of the khas lands as determined by the decree of the District Judge, also to reverse the decree of the District Judge so far as it declares that the Plaintiffs are entitled to get joint possession with Defendants No. 1; and also so far as it directs that an order of injunction be issued; also to reverse that portion of the decree which orders "that, on payment of excess Court fees proportioned to the excess of the amount found due, over the valuation of the plaint, calculated at the rate of 8 annas per bigha of the decreed lands from the beginning of 1291 Amli until the date of possession, the Plaintiffs shall get two-thirds of 14-annas share, in accordance with the decision of the 6th issue," and in lieu thereof to order and declare that the Plaintiffs do recover from the Defendants No. 1 a sum of money calculated

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at the rate of two-thirds of 7 annas per bigha a year for 4128 bighas, as compensation in respect of the exclusive use and benefit by the Defendants No. 1 of 4128 bighas, from the beginning of the year 1291 Amli to the 4th of January, 1886, the date of the said decree; also to affirm the decree of the District Judge so far as it relates to costs.

It may be right to mention, with reference to that portion of the decree above recommended which relates to compensation, that the rate of 8 annas per bigha was not disputed by the *Watsons*, Appellants, and that the High Court were not prepared to dissent from the finding of the District Judge in fixing the area of the khas lands at 4128 bighas.

The Respondents must pay the costs of this appeal.

Solicitors for the Appellants : *Freshfields & Williams.*

Solicitor for the Respondents : *E. Kimber.*

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MUSSUMMAT DURGA CHOUDHRAIN . . PLAINTIFF;

AND

JAWAHIR SINGH CHOUDHRI - . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

Procedure—Civil Procedure Code, s. 584—*Second Appeal.*

No second appeal lies except on the grounds specified in sect. 584 of the *Civil Procedure Code.*

There is, therefore, no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be.

Where there is no error or defect in the procedure the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding.

Futtehma Begum v. *Mohamed Ausur* (Ind. L. R. 9 Calc. 309) and *Nivath Singh* v. *Bhikki Singh* (Ind. L. R. 7 All. 649) overruled.

APPEAL from a decree of the Judicial Commissioner (July 30, 1886) passed on second appeal, and affirming a decree of the

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Commissioner of the *Nurbudda* Division (May 1, 1886), which had reversed a decree of the extra Assistant Commissioner of *Narsinghpur* (Sept. 28, 1885).

The facts are stated in the judgment of their Lordships.

Cowie, Q. C., and *Mayne*, for the Appellant, contended that it was open to the Judicial Commissioner to consider the question of partition on its merits, and that he ought to have decided it in favour of the Appellant. [They referred to the *Civil Procedure Code*, sect. 584 : *Lachman Singh* v. *Mussummat Puna* (1); *Nivath Singh* v. *Bhikki Singh* (2) ; *Futtehma Begum* v. *Mohamed Ausur* (3) ; *Assanullah* v. *Hafiz Mahomed Ali* (4). [SIR R. COUCH referred to *Anangamanjari Chowdhrani* v. *Tripura Soondari Chowdhrani* (5).]

Doyne, and *C. W. Arathoon*, for the Respondents, were not heard.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN :—

This is an appeal against a decree of the Judicial Commissioner of the Central Provinces, passed on second appeal, affirming a decree of the Commissioner of the *Nurbudda* Division, which had reversed a decree of the Assistant Commissioner of *Narsinghpur*.

The appeal comes before this Board with the usual certificate from the Judicial Commissioner, to the effect that it involves a substantial question of law.

The Judicial Commissioner on second appeal had no jurisdiction to rehear the case on the merits. The only grounds on which a second appeal can be brought are stated in sect. 584 of the *Civil Procedure Code*, Act XIV of 1882. They are these :—

" (*a.*) The decision being contrary to some specified law, or usage having the force of law.

" (*b.*) The decision having failed to determine some material issue of law, or usage having the force of law.

" (*c.*) A substantial error or defect in the procedure as prescribed

(1) L. R. 16 Ind. Ap. 125.
(2) Ind. L. R. 7 All. 649, 652.
(3) Ind. L. R. 9 Calc. 309.
(4) Ind. L. R. 10 Calc. 932.
(5) L. R. 14 Ind. Ap. 101.

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by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits."

In sub-sect. (*a*) the word " specified " obviously means specified in the memorandum or grounds of appeal.

At the outset of the argument their Lordships were informed that, according to Indian authorities, the appeal might be supported under sub-sect. (*c*) if it did not fall within sub-sect. (*a*); but they were told that it was impossible to state the point intended to be raised without going into the facts of the case.

The facts are few and simple. The Appellant, who was Plaintiff in the Lower Court, is the widow of the younger son of one *Beni Singh*, who died in 1878. The suit was brought to establish her right to certain villages which had been in her husband's possession and registered in his name, but which after his death in 1883 were registered in the name of his elder brother, the Respondent *Jawahir Singh*.

The Appellant's right as heiress to her husband depended upon her establishing that a partition of the family property had taken place in the year 1857.

It was not disputed that *Beni Singh* did make a division of the family property in 1857 between himself and his two sons. The Appellant contended that this division was an absolute partition. The Respondent maintained that it was merely a convenient arrangement for the purposes of management.

In support of the Appellant's case witnesses were produced who deposed to conversations alleged to have taken place at the time of the division of the property. A copy of a petition was put in, purporting to proceed from *Beni Singh*, but not signed by him, which was filed in the Revenue Court in October, 1864, and which contained this sentence:—" It is now five or six years since I divided the villages between my sons." Moreover, it was proved that the father and the two sons kept separate accounts with the same native banker, and lived separately.

On the other hand, it appeared that in 1864, at a settlement, when the investigation into proprietary rights was made, neither the Respondent nor the Appellant's husband set up any claim to any part of the property. *Beni Singh* claimed to be solely

entitled, and the Settlement Officer awarded to him and to him alone proprietary rights in the whole estate. From 1864 to 1878, when *Beni Singh* died, the estate was entered in the Collector's register as *Beni Singh's* property.

The Assistant Commissioner found in favour of the Appellant that the property was partitioned in 1857. From this finding the Respondent appealed, relying mainly upon the following grounds of appeal :—

"3. That the property being ancestral, and there being no deed of partition to prove that a partition was effected in Sambat 1914, *i.e.*, about 1857 A.D., the Court ought to have held no partition was effected.

" 4. That the oral evidence produced by the Plaintiff to prove partition is utterly worthless and unreliable.

" 5. That the entry of *Beni Singh's* name as sole proprietor of the villages in the Settlement Records, and his name appearing in the jamabandis till his death, conclusively disprove the statement of the Plaintiff that a complete partition of the villages was effected in Sambat 1914.

" 6. That *Beni Singh* not having mentioned anything about the partition alleged by the Plaintiff at the time of the settlement, and his subsequently bringing rent suits in his own name and signing the rent receipts of the tenant, disproved the partition alleged by the Plaintiff.

" 7. That the Lower Court ought to have rejected the copy of a petition dated the 12th of October, 1864, filed by the Plaintiff and alleged by her to have been presented to the Settlement Superintendent as being not proved, and therefore not admissible in evidence.

" 10. That the Lower Court was wrong in holding that the Defendant, living separately and having separate dealing, established partition."

The judgment of the Commissioner, so far as material for the present purpose, was as follows :—

" The facts of the case are stated in the Lower Court's judgment. On the pleas, which were very fully argued on both sides, I find as follows—

" Plea 3. This plea also is, I think, sound. I agree with

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Appellant's pleader that the burden of proving partition fell on Plaintiff, and that Plaintiff quite failed to prove it. The settlement proceedings alone, in my opinion, disprove it, while oral evidence as to an event twenty-nine years old is of little weight, and there is absolutely no documentary evidence.

"This disposes of pleas 4, 5, 6.

"Plea 7. I agree in this plea. The document was not trustworthy, and there was no trustworthy evidence about it.

"Plea 10. This plea is also sound and in accordance with common custom."

Having stated the facts of which a summary has been given, and having read the Commissioner's judgment, the learned counsel for the Appellant proceeded to argue that it was open to the Judicial Commissioner, and therefore open to their Lordships, to review the Commissioner's finding, on the ground that his decision involved or amounted to a substantial error or defect in procedure.

In support of this view counsel referred to several authorities in *India*, of which the most important are *Futtehma Begum* v. *Mohamed Ausur* (1), and *Nivath Singh* v. *Bhikki Singh* (2). In the former case the judgment of the Court contains the following passage :—

"It is not the ordinary course of procedure for this Court to interfere in second appeal with any findings of fact which have been arrived at by the Lower Appellate Court ; but we are well within the scope of the authorities in holding that where the Lower Appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence, and to give weight to other evidence to which it is not entitled, and has thus been led not into any mere accidental mistake, but totally to misconceive the case, this Court may interfere."

These observations were cited with approval in the *Allahabad* case, where the full Bench (diss. *Petheram*, C.J.) apparently came to the conclusion that an erroneous finding of fact under similar circumstances might be treated as an error or defect in procedure within the meaning of sect. 584.

(1) Ind. L. R. 9 Cal. 309.

(2) Ind. L. R. 7 All. 649.

The learned counsel for the Appellant contended that these rulings covered the present case. The Lower Appellate Court, it was said, had clearly misapprehended the effect of the settlement proceedings in 1864; undue weight had been attached to the registration in *Beni Singh's* sole name; the oral evidence had been wholly discarded; sufficient weight had not been given to the important statement in *Beni Singh's* petition, or to the separate dealings of his two sons; the Court had thus been led to misconceive the case entirely, and to find for the Defendant when the finding should have been for the Plaintiff.

It would be an unprofitable task to inquire how far this contention is well founded, because their Lordships cannot accept the rulings of the High Courts of *Calcutta* and *Allahabad* as a correct statement of the law. Nothing can be clearer than the declaration in the *Civil Procedure Code* that no second appeal will lie except on the grounds specified in sect. 584. No Court in *India* or elsewhere has power to add to or enlarge those grounds. It is always dangerous to paraphrase an enactment, and not the less so if the enactment is perhaps not altogether happily expressed. Their Lordships therefore will not attempt to translate into other words the language of sect. 584. It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the First Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding: *Ananga-manjari Chowdhrani* v. *Tripura Soondari Chowdhrani* (1), *Pertab Chunder Ghose* v. *Mohendra Purkait* (2).

Their Lordships are unable to dispose of the case without expressing their regret that the Commissioner should have dealt with the matters before him in so meagre a fashion. They have no reason to doubt that all the evidence was fully and duly considered by him, but they cannot help thinking that a judgment more carefully expressed might have prevented an idle appeal.

(1) L. R. 14 Ind. Ap. 101.

(2) L. R. 16 Ind. Ap. 233.

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Their Lordships must also express regret that the Judicial Commissioner, having rightly treated the case as one depending entirely on issues of fact which he had no jurisdiction to review, should yet have felt himself constrained by authority to give a certificate to the effect that a substantial question of law was involved in the appeal.

Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed.

The Appellant will pay the costs of the appeal.

Solicitors for Appellant : *Watkins & Lattey.*

Solicitors for Respondent : *T. L. Wilson & Co.*

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RAJA JOGENDRA BHUPATI HURRI CHUNDUN MAHAPATRA . . . . } APPELLANTS;

AND

NITYANUND MANSINGH (PLAINTIFF) AND ANOTHER . . . . . } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF BENGAL.

Hindu Law—Mitakshara—Sudras—Rights of Illegitimate Son—Survivorship.

Where a deceased rajah had succeeded to an impartible Raj as the only legitimate son of the last holder :—

Held, that the deceased, not having left male issue, the Plaintiff, as an illegitimate son of the same father, the family belonging to the Sudra caste, was entitled under the Mitakshara to succeed by survivorship.

APPEAL from a decree of the High Court (June 2, 1885), affirming a decree of the Subordinate Judge of *Cuttack* (March 29, 1883).

The facts are stated in the judgment of their Lordships.

The material portion of the judgment of the First Court was as follows :—

" As an illegitimate brother, the Plaintiff is not, under Hindu law, an heir. The question, however, yet remains, as to whether the Plaintiff can succeed by right of survivorship. He contends

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that he can, and cites *Sadu* v. *Baiza and Genu* (1), in support of his contention. The ruling cited, I find, allows that an illegitimate brother like the Plaintiff may succeed on the ground of survivorship ; but the circumstances of that case and this are not exactly similar. In the *Bombay* case, the property in dispute was partible property, to which both the legitimate and the illegitimate brothers had jointly succeeded ; whereas in this, it is impartible property, of which the legitimate brother alone has, according to family custom, had possession. In the former, partition might have been, but was not, demanded ; while in the latter, owing to the family custom, no such demand could have been made. In both some portion of the disputed property appears to have been assigned to the illegitimate brother for his support. The brothers in the *Bombay* case admittedly lived apart ; and the same may, I think, be said of those in this, for the evidence clearly points that way. The difference in the cases certainly is not great. All it amounts to is, that in one case there was a joint succession, and in the other there was not. The question, therefore, that arises is, would so trifling a difference deprive the Plaintiff of his right to succession by survivorship ? I feel satisfied it would not. Under the Hindu law, both brothers were, on the death of their father, jointly entitled to the disputed property ; and that they did not then so succeed was owing only to a special custom in the family, under which the succession was restricted to one. The possession, under the circumstances, of the legitimate brother could not possibly make what was joint his separate property ; nor could it extinguish the title of the Plaintiff. The Plaintiff's title was, I hold, simply in abeyance during the period of such possession, and as the legitimate brother is now dead, there is nothing, as I can see, to prevent the Plaintiff from asserting that title and claiming the property as his on the ground of survivorship ; and I would accordingly so find."

On appeal, the High Court held, that "the Plaintiff's mother was a slave-girl, and not a legal wife married after the phoolbibahi form." Also, that *Raja Upendra*, the Plaintiff's father, was a Sudra, and his mother a female slave ; and that the Plaintiff was therefore so far a co-parcener with *Raja Nundkishore* in

(1) Ind. L. R. 4 Bomb. 37.

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the joint impartible estate, as to be entitled on the death of the latter without a son to succeed by right of survivorship. And in so deciding, the Division Bench followed the decision of the *Bombay* High Court in the appeal of *Sadu* v. *Baiza and Genu* (1).

C. W. Arathoon, for the Appellant, contended, that under the Mitakshara law the Plaintiff was not entitled on the death of his father to the disputed property jointly with *Raja Nundkishore*. The conception of co-parcenership presupposes sapinda relationship and a legal marriage. The High Court was in error in placing the illegitimate son in the same category as an adopted son, where a legitimate son is born after the adoption. Nor is there sufficient authority for saying that an illegitimate son can take by survivorship. Reference was made to *Nissar Murtojah* v. *Kowar Dhunwunt Roy* (2); *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (3); *Sadu* v. *Baiza and Genu* (1); Dattaka Chandrika, Ch. V, sect. 31; *Krishnayyan* v. *Muttusami* (4); *Ranoji* v. *Kandoji* (5).

Cowie, Q. C., *Doyne*, and *Mayne*, for the Respondent *Nityanund Mansingh*, were not heard.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

The Plaintiff in this case sued to establish his title to the Raj and zemindari of *Killa Sukinda*, in the district of *Cuttack*. The Plaintiff's father, *Raja Upendra Bhupati*, died on the 23rd of October, 1857, leaving a son, *Nundkishore*, by his *Rani Nilmoni*; a son by a woman called *Rambha*, the Plaintiff; and a third son, *Abhin Roy Singh*, by a woman called *Asili*. He was succeeded in the Raj by his legitimate son *Nundkishore*. *Nundkishore* died on the 5th of March, 1878, leaving no son, but leaving three widows —Ranis—and a daughter by one of them. The Plaintiff claimed to succeed to *Nundkishore* on the allegation that his mother was the lawful phoolbibahi wife of *Upendra*. It has been found by

(1) Ind. L. R. 4 Bom. 37.
(2) Marshall, 609.
(3) Law Rep. 15 Ind. Ap. 51.
(4) Ind. L. R. 7 Madras, 407, 413.
(5) Ind. L. R. 8 Madras, 557.

the Subordinate Judge and by the High Court that his mother *Rambha* was not the lawful wife as alleged by the Plaintiff, and that the Plaintiff must be treated as the illegitimate son of *Upendra*. It has also been found that *Raja Upendra* and his family were Sudras.

On these facts the question which has been argued before their Lordships arises, viz., whether according to the rules of Hindu law, having regard to the fact, which was admitted, that the law of the Mitakshara is applicable, the Plaintiff is entitled by right of survivorship to succeed to the Raj upon the death of his half-brother *Nundkishore*, the legitimate son.

Now, it may be well first to dispose of a point arising out of the fact that this is an impartible Raj, which it is admitted to be. According to the decision in the *Shivagunga Case*, which, as their Lordships understand, is not now disputed, the fact of the Raj being impartible does not affect the rule of succession. In considering who is to succeed on the death of the Raja, the rules which govern the succession to a partible estate are to be looked at, and therefore the question in this case is, what would be the right of succession, supposing instead of being an impartible estate it were a partible one?

The case was decided in the Plaintiff's favour by the Subordinate Judge; and there was an appeal to the High Court, in which the learned Judges of the High Court, after noticing certain decisions that had been quoted, held, on the authority of the case of *Sadu* v. *Baiza and Genu* (1), decided by the *Bombay* High Court, that the Plaintiff was entitled to succeed to the Raj.

The case in the *Bombay* High Court appears to have been very similar to the present. There the two sons, the legitimate and the illegitimate, survived the father, and upon the death of the legitimate son the question was whether the illegitimate son was entitled to succeed to the whole of the estate. The Mitakshara, in chap. i., sect. 12, deals with the rights of a son by a female slave in the case of Sudras, which is the present case, and the first verse is: "Even a son begotten by a Sudra on a female slave may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety

(1) Ind. L. R. 4 Bomb. 37.

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of a share, and one who has no brothers may inherit the whole property in default of daughter's sons." The second verse is: "The son begotten by a Sudra on a female slave obtains a share by the father's choice, or at his pleasure. But after" [the demise of] "the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share; that is, let them give him half (as much as is the amount of one brother's) allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters. But if there be such, the son of the female slave participates for half a share only." Now it is observable that the first verse shews that during the lifetime of the father the law leaves the son to take a share by his father's choice, and it cannot be said that at his birth he acquires any right to share in the estate in the same way as a legitimate son would do. But the language there is very distinct, that "if the father be dead the brethren should make him partaker of the moiety of a share." So in the second verse the words are that the brothers are to allow him to participate for half a share, and later on there is the same expression: "The son of the female slave participates for half a share only." The learned Chief Justice of the *Bombay* High Court notices these passages, and after observing that the Mitakshara makes no special provision for the case of the death either of the legitimate or of the illegitimate son after the death of their father and before partition, he says: "But the effect of what he has said being, as we think, to create a co-parcenery between the son of the wedded wife and the son of the female slave, we understand him as tacitly leaving such a case to the ordinary rule of survivorship incidental to a co-parcenery, and that accordingly the survivor would take the whole if the other died without leaving male issue." It appears that in the course of the argument the question was put to the learned counsel by the Chief Justice as to what would be the case if, instead of the legitimate son being the one who had died, the illegitimate son had died, and the legitimate son survived; and it was apparently admitted, that in such a case the legitimate son would take the share of the illegitimate son by survivorship. If that be so, their

Lordships cannot see any reason for holding that the illegitimate son would not take by survivorship in the case of the death of the legitimate son. It cannot be a different right—in the one case a right by survivorship, and in the other no right by survivorship. There is not only the judgment of the Chief Justice, and two other Judges of the High Court of *Bombay*, but the case came before them by appeal, there being a difference of opinion between the two Judges before whom it came in the first instance, and one of those learned Judges was a Hindu, Mr. Justice *Nanabhai Haridas*, who carefully examined the authorities, and came to the same conclusion. It is not necessary to quote more of his judgment than this passage: "I would therefore hold that the Plaintiff and *Mahadu*, being male members of an undivided Hindu family, governed by the Mitakshara law, the former"—that is, the illegitimate son—"upon *Mahadu's* death without male issue, became entitled to the whole of the immoveable property of that family, there being no question about any moveable property in this special appeal." Therefore their Lordships have before them the well-considered judgment of the High Court of *Bombay* upon this question, as well as that of the High Court at *Calcutta*, and it appears to them that the learned Judges of those Courts put a right construction upon the law as stated in the Mitakshara.

Their Lordships are of opinion in the present case that the Plaintiff was entitled to succeed to the Raj by virtue of survivorship, and that the judgment of both the Lower Courts should be affirmed. They will therefore humbly advise Her Majesty to dismiss the appeal. The Appellants will pay the costs of it.

Solicitors for the Appellants : *Wrentmore & Swinhoe.*

Solicitors for the Respondent : *T. L. Wilson & Co.*

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March 5, 6, 7, 8; May 1.

SRIMANTU RAJA YARLAGADDA MALLIKARJUNA (DEFENDANT) . . . . . } APPELLANT;

AND

SRIMANTU RAJA YARLAGADDA DURGA (PLAINTIFF) AND ANOTHER (DEFENDANT) . } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Hindu Law of Succession—Primogeniture—Impartibility—Evidence.

The question whether an estate is subject to the ordinary Hindu law of succession or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it :—

Held, in this case, on the evidence, that the estate of *Devarakota* is impartible and descends to the eldest son of the last owner.

By Regulation XXV of 1802 (*Madras*) and the istimirar sannad issued thereunder, the zemindar acquired a permanent property in the estate at a fixed assessment, but the tenure and right of succession remained unchanged.

The *Hunsapore Case* (12 Moore's Ind. Ap. Ca. 35) held applicable.

APPEAL from a decree of the High Court (Aug. 18, 1885), reversing a decree of the District Court of *Kistna* (Sept. 30, 1882).

The parties to the appeal were the three sons of the last zemindar of *Devarakota*, also known as *Sallapalli*, who died in April, 1875. The Appellant was the eldest, and as such was registered as zemindar in succession to his father. The first Respondent was the second son. He sued the Appellant and the second Respondent for a partition of the estate, including the zemindary. The District Judge held that the zemindary was impartible. That decision was reversed by the High Court, which was of opinion that it was partible. The case for the Appellant rested entirely on documentary evidence, the genuineness of which was admitted. And the main question for decision was, whether the original or Appellate Court drew the more correct conclusion as to the nature of the zemindary in the hands of the previous holders.

* *Present* :—LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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Devarakota is one of the zemindaries which make up the district of *Condapillee*, one of the northern circars. The history of these circars is given in *Grant's* Political Survey. They originally belonged to the Hindu rajahs of *Ooria*. In 1571 they were conquered by one of the Mahomedan sovereigns of the *Kootubshaky* dynasty. In 1687 the last of this race was subdued by *Allum Gir*, Emperor of the Moguls, and the northern circars passed over to his sway. In 1724, *Nizam-ul-Mulk* became the ruler of this district, nominally as Viceroy of the Emperor of *Delhi*, but really as an independent Sovereign. His subordinate, *Rustum Khan*, ruled the northern circars for seven years from 1732. He broke up the Zemindari system of administration which had previously prevailed, substituting a new system of his own; but when he passed away the representatives of the old zemindars appear to have resumed their original positions with proprietary rights. In 1753, the French, under *Bussy*, obtained an assignment of the northern circars from the Nizam. They suspended the zemindars from their functions as representatives of the Sovereign, but left them in the enjoyment of savarams and such other privileges as they possessed in connection with their zemindary estates. Their military duties were also enforced as before. In 1759, the conquest of *Masulipatam* by the English put an end to the French administration, and a period of seven years' anarchy set in, during which any authority which existed was exercised in the name of the Nizam, and especially by his amildar, *Hassein Ali Khan*. Under his administration the zemindars, who had been suspended by the French, appear to have resumed all their former authority. This state of things was terminated in 1766, when the Nizam, by a treaty with Lord *Clive*, confirmed the grant of these circars to the *East India Company*, which had been made by the Mogul Emperor in the previous year. The British continued the zemindary system, which they found in existence, making settlements of the revenue with the zemindars, first from year to year, afterwards for longer periods, until at length the permanent settlement was introduced in 1802 under the *Madras* Regulation XXV of that year.

On the 8th of December, 1802, a sannad milkeat-i-istimirar as granted in the usual form to *Yarlagadda Ankinidu*, zemindar

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of *Devarakota*. He died in 1818, and was succeeded by *Durga Prasada*, his adopted son, who was succeeded by *Ankinidu*, the father of the parties to this appeal, who died in April, 1875.

On the 2nd of May, 1875, his younger son petitioned the Collector that the zemindary should be registered in the joint names of the three brothers. The Appellant, on the other hand, claimed that it was impartible and passed by primogeniture. In September, 1875, the zemindary was registered in the name of the Appellant.

On the 16th of April, 1880, the first Respondent filed his plaint in the District Court of *Kistna* against the Appellant and the second Respondent praying for a partition of all the properties left by his father, *Ankinidu*, including the zemindari. He alleged as to it, that their ancestors had during the reign of the Mahomedan rulers come into this part of the country as husbandmen, and afterwards, during the latter part of the Mahomedan rule and the beginning of the British rule, used to form temporarily *Devarakota* and other estates on frequently varying terms, and for varying amounts of rent. But instead of being allowed to continue uninterruptedly in the enjoyment of even such temporary lease rights, they were divested of them every now and then ; some time afterwards they acquired them back from the then authorities as a matter of favour, and all the members of the family used to enjoy these rights.

He further alleged, that about the year A. D. 1796, the family lost all such rights as they had in all those estates, including *Devarakota* ; and that some time after A. D. 1796, Rajah *Ankinidu Garu*, who was the paternal great-grandfather of the parties to the suit, acquired through his personal exertions from the British Government so much of the *Devarakota* estate, consisting of sixty-seven villages, which remained after detaching the six lankas (islands) which once formed a portion of the *Devarakota* estate, and which were subsequently annexed to the *Divi Pargana*, and obtained an istimirar sannad on the 8th of December, 1802, providing, *inter alia*, for his and his heirs enjoying the estate, with power to alienate the same by sale, gift, or otherwise.

He submitted that, according to the provisions of the Hindu

law and the nature of the estate, and agreeably to the terms of the istimirar sannad and custom, the Plaintiff and the Defendants, as sons and heirs of the said Rajah *Ankinidu Garu*, were entitled to divide and enjoy equally the whole of the above property, including the estate of *Devarakota*.

On the 12th of August, 1880, the Appellant filed his written statement, wherein he denied the above allegations, and stated that *Devarakota* had been uninterruptedly enjoyed by his ancestors for the last 600 years, and that it was impartible and descended to a single member by way of primogeniture.

The evidence is sufficiently stated in the judgment of their Lordships.

The District Court dismissed so much of the suit as claimed a partition of the zemindari. The Judge reviewed all the documentary evidence in the case, and considered the cases of the *Nusvid Zemindari* (1), the *Shivagunga Zemindari* (2), and the *Hunsapore Zemindari* (3). On the whole, he came to the conclusion, "that the zemindari of *Devarakota* is an impartible zemindari and descendible to the eldest son as against other sons."

The High Court in appeal decreed in favour of the Plaintiff as regards the right to a partition of the zemindari; the Court reviewed the documentary evidence on both sides. It came to the conclusion that prior to British rule the family were desmukhs, or revenue officers, with certain emoluments, and that the zemindari did not exist. It summed up its views in the following paragraphs:—

"It appears to us that whatever estate the family had in the Desmooky emoluments came to an end in 1789, when the Government indicated as its reason for resuming those emoluments that the services attached to the office had long been discontinued, and were no longer required; that *Kodandaram* obtained the zemindari in virtue of the possession he held as renter, and that this right, which was regarded as terminable at the pleasure of the Government, was eventually confirmed to his grandson in perpetuity; that the changes of possession which followed *Kodandaram's* death until the first succession after the

(1) Law Rep. 7 Ind. Ap. 38. (2) Law Rep. 8 Ind. Ap. 99.
(3) 12 Moore's Ind. Ap. Ca. 1.

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permanent settlement were not regarded as successions governed by any law or custom of inheritance, but as acts of the administration which the other members of the family could not question, or at any rate that they cannot be regarded as instances of a family custom, to which the other members submitted with a consciousness that they were bound to do so.

"In the view we take, the estate cannot be said to be the self-acquisition of *Ankinidu*.

"We must then hold that the first Defendant failed to prove the existence of a usage overriding the ordinary law, and that the zemindari is partible."

Mayne, for the Appellant, contended, that upon the whole evidence in the case it ought to be held that the zemindari of *Devarakota* was ancient, impartible, and passed by primogeniture. He referred to its history as given by Mr. *Grant* in his Political Survey—*see* Appendix to the Fifth Report of the Select Committee of the House of Commons in 1812 on the affairs of the *East India Company*, pp. 18, 155; 7th vol. of *Mill's* British India, bk. i., c. 7; a letter by Mr. *Roberts*, Collector of *Masulipatam*, to the Board of Revenue, October 30, 1824. Reference was also made to *Collector of Trichinopoly* v. *Lekhamoni* (1). A pedigree was put in founded upon a genealogy furnished in 1792 by *Venkatramanna*, thezemindar in possession, in obedience to orders received from the Board of Revenue. Great weight has been given to such documents in former cases: see *Naragunty Lutchmeedevamah* v. *Weigama Naidoo* (2), *Stree Raja Yanumula Venkayamah* v. *Stree Raja Yanumula Boochia* (3). With regard to the sannads said to have been granted by the Mahomedan rulers, they were not producible. But grants were produced from 1738 onwards. *Kodandaram* was shewn to have been zemindar previous to the French management in 1753, and was subsequently recognised by the British Government as zemindar and as a military chieftain. Documentary evidence was referred to as shewing that the British authorities recognised his claim as zemindar in the fullest degree. He died in 1791, and in the disputes which arose as to

(1) Law Rep. 7 Ind. Ap. 282.
(2) 9 Moore's Ind. Ap. Ca. 66, 88.
(3) 13 Moore's Ind. Ap. Ca. 333, 339.

succession it was never suggested that the zemindari could be held by more than one person at a time, and it was assumed that it went by primogeniture. In 1802 a sannad milkeat-i-istimirar was granted in the usual form to *Yarlagadda Ankinidu*. See Regulation XXV of 1802. Reference was made to the *Nuzvid Case* (1); *Shivagunga Case* (2); *Hunsapore Case* (3); *Rawab Urjun Singh* v. *Rawab Ghunsian Singh* (4); *Baboo Gunesh Dutt Singh* v. *Maharajah Mohesur Singh* (5); *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethuraya* (6); *Chowdry Chintaman Singh* v. *Mussamut Nowlucko Koonwari* (7); *Collector of Madura* v. *Moothor Ramalinga Sethupathy* (8).

Cowie, Q. C., and *Doyne*, for the Respondents, contended that the judgment of the High Court ought to be affirmed. There was no sufficient foundation in the evidence in support of the view taken by the Judge of the First Court. He seemed to think that the connection of this family with *Devarakota* was at first that of mere collectors of revenue, but that it became in course of time hereditary and developed into the higher status of zemindars of an ancient and impartible zemindari. He based this view on the supposed fact that one member of the family had always been employed to the exclusion of the others to collect the revenue previous to 1802, and had done so by hereditary right. But as observed by the High Court, previously to the English conquest in 1766, there is no trace of this family or of any single member of it being in possession as or styled zemindars, or being in continuous possession even as revenue officers. *Kodandaram*, no doubt, in 1784 was reinstated in the office, and appears to have been styled zemindar on occasions, and to have subsequently obtained cowlies for short periods, by which he became responsible for the revenue of *Devarakota* at varying amounts. He does not appear to have put forward any pretension to the rights of zemindar such as are now claimed by the Appellant as the head of his house. It was contended on the evidence, that previous to

(1) Law Rep. 7 Ind. Ap. 38.
(2) Law Rep. 8 Ind. Ap. 99.
(3) 12 Moore's Ind. Ap. Ca. 1.
(4) 5 Moore's Ind. Ap. Ca. 169, 182, 185.
(5) 6 Moore's Ind. Ap. Ca. 164.
(6) 14 Moore's Ind. Ap. Ca. 578.
(7) Law Rep. 2 Ind. Ap. 263, 272.
(8) 12 Moore's Ind. Ap. Ca. 400.

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1802 the *Madras* Government and revenue authorities did not recognise any hereditary or other indefeasible right in any one member of this family to *Devarakota* as an ancient and impartible zemindari. No such pretension was then put forward or any sannads produced in support of it. In *Madras* Regulation XXV of 1802, there is no reference to any supposed right of primogeniture, nor is there any in the sannad granted in pursuance of the regulation. On the true construction of the sannad the zemindari was given to *Ankinidu* and his heirs to descend according to the ordinary Hindu law of inheritance. Since that grant in 1802 down to 1875, the date of the death of the father of these parties, no previous descent occurred as to which the present question could have arisen. The descent of the zemindari would not be governed by any custom regulating the descent of the office of desmukh or revenue collector of *Devarakota* previous to 1802; assuming the First Court to be right in holding that a custom of impartibility and descent by primogeniture had been established in reference to that office. He was however wrong in that finding. The office of desmukh or desai was hereditary; but the further incidents relied on were not proved. Impartibility depends upon tenure, not on the terms of the settlement with Government. In all the cases cited the decision of the issue as to impartibility was made dependent upon the continuity with which the estate had been held as impartible. The Appellant has not shewn that the zemindari was held and descended prior to 1802 impartibly.

Mayne, replied.

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May 1.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

The question in this appeal is whether a large estate called *Devarakota*, in the northern circars in the Presidency of *Madras*, is impartible, and descends to the eldest son of the last owner. The parties to the suit are the three sons of *Ankinidu*, who died possessed of the estate on the 6th of April, 1875. The Appellant is the eldest son, and shortly after his father's death he took possession of the estate, and had remained in possession of it till

the bringing of the suit. The Respondent *Durga Prasada* is the second son, and on the 16th of April, 1880, he brought the suit in the District Court of *Kistna* against his brothers, praying that he and the two Defendants might be declared each entitled to a one-third share in the property. Issues were framed, of which only the second is now material. That is, whether the estate called in the issues the zemindari of *Devarakota* is an impartible zemindari, and descendible to the eldest as against other sons, or partible. The District Judge held that the estate was impartible, and disallowed that part of the Plaintiff's claim. In respect of other matters, which need not now be noticed, his claim was allowed. The High Court of *Madras*, on appeal, held that the estate was partible, and reversed that part of the decree.

In Mr. *Grant's* Political Survey of the Northern Circars, submitted to the Governor-General and Council at *Calcutta* on the 20th of December, 1784, and inserted in the Appendix to the Fifth Report from the Select Committee of the House of Commons on the affairs of the *East India Company*, there is a notice of the family in which it is stated that they first settled at *Devarakota* as combies or husbandmen in 1580, and were supposed to have got their first sannads for Desmooky jurisdiction from *Abdullah Kootub Shah* in 1640, though not constantly confirmed in the possession of it by future rulers. In 1732, being involved in the general proscription of *Rustum Khan*, they lost all territorial jurisdiction, rights and privileges, but in the confusion of subsequent revolutions they regained possession, and were numbered in the Convention of 1766, by which the northern circars were transferred to the *East India Company*. *Devarakota* is stated by Mr. *Grant* to be in the Circar of *Condapillee*, and appears from the rental concluded with the ryots to have been one of the largest estates there.

Their Lordships think that, in considering the evidence upon the question of impartibility, it is not necessary to go further back than 1766. At that time one *Kodandaram* was in possession of the estate. He died on the 20th of November, 1791, leaving three sons, *Venkatramanna*, *Naganna*, and *Venkatadri*. *Venkatramanna* succeeded to the whole estate, and died after a few

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months in 1792. On his death the zemindari was claimed by *Naganna*, and a claim was set up on behalf of his son *Ankanna*, then a boy of thirteen or fourteen years old, on the ground of his having been adopted by *Venkatramanna*. The adoption was denied by *Naganna*. The Government, which appears at that time to have been the only authority which had power to decide the question, there being no Civil Court competent to do so, resolved that the right of succession was in *Naganna*, and ordered him to be put in possession. In November, 1796, *Naganna* was dispossessed of the estate by the Collector of *Masulipatam*, who, in his letter to the Board of Revenue assigning his reasons for doing so, said :—" It appears that the zemindar has failed in the payment of the customary tribute due by him to the company on account of that zemindari." And in a letter from the Board of Revenue to the Governor in Council, dated the 22nd of March, 1798, they say :—" The conduct of *Nageswaram Naidu* (another name for *Naganna*), although it ought to disqualify him from being longer entrusted with the care of a zemindari, certainly has not been such as to set aside for ever the rights of his son, who, it appears by the report of the Chief and Council of the 12th of March, 1792, contested the succession with his father, under the plea of having been adopted by his uncle *Venkataramayya*, the late *Kondandaram's* eldest son, who died without issue soon after his father. We, therefore, in consideration of this right, not as giving a preference to zemindari management, concur in Mr. *Oakes'* (the Collector) recommendation in his favour."

The Governor in Council, in a letter to the Board of Revenue of the 4th of April, 1798, said as to this recommendation, " We owe it to the rights of the young Zemindar *Ankanna*, as well as to considerations which arise from the late Collector's administration, to concur in the recommendation of Mr. *Oakes* and your Board for the restoration of this zemindari to *Ankanna*." The words " rights of the young zemindar " are opposed to the view of the High Court that the changes of possession were simply acts of administration. At this time *Ankanna* had a younger brother named *Gungadhara*, and there is evidence of allowances for maintenance being made to him and to *Venkatadri*

the youngest son of *Kodandaram*. In a letter from the Secretary of the Board of Revenue to the Collector in February, 1800, the Board approves of his making an allowance out of the revenue of *Devarakota* to *Ankanna* (there called *Ankinidu*) of 100 pagodas per month during the period his zemindari is under assumption, and directs him to continue the allowances granted to *Nagesha Naidoo* (*Naganna*) and the uncle of *Ankanna* (*Venkatadri*).

On the 28th of February, 1801, the Collector wrote to *Ankanna* by the name of *Ankinidu* as follows: "It is surprising that you have written to say that you will pay 10 pagodas per mensem to your younger brother *Gungadhara Naidu*, though the responsibility of maintaining him rests to a great extent with you. I think that at least 15 pagodas per mensem should be given him. If you do not do so, how will you acquire our goodwill?" It is apparent from this that *Ankanna* had before this time been restored to the zemindari, though it does not appear in the proceedings when this took place.

Their Lordships think that the result of the evidence in the suit is that at this time *Ankanna* was in possession of the estate by right of primogeniture as an impartible estate, and was so regarded by the Government.

Regulation XXV of 1802 (*Madras*) was passed on the 13th of July. It recites that the public assessment of the land revenue had never been fixed, and that the Government had resolved to grant to zemindars and other landholders, their heirs and successors, a permanent property in their land in all time to come, and to fix for ever a moderate assessment of public revenue on such land, the amount of which should never be liable to be increased under any circumstances. On the 8th of December, 1802, an istimirar sannad was granted by Lord *Clive*, then Governor in Council of *Fort St. George*, to *Ankinidu*, otherwise *Ankanna*, fixing the assessment of the zemindari at the annual sum of 29,340 star pagodas, and declaring it to be permanent. *Ankinidu* thus acquired a permanent property in the land at a fixed assessment, but there was no grant of the land, and the rule of succession to it was not altered. The estate remained entire, and there is no evidence of any intention of the Government to alter the nature of the tenure. What is said by this Board in

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the judgment in the *Hunsapore Case* (1), is applicable to the present case. The estate continued to be impartible, and the rule of succession to it was not altered.

There is evidence of a later date which is some proof in support of this. *Ankanna* adopted *Durga Prasada*, the son of *Gungadhara*, and after his death in 1833, his widow adopted *Ankinidu*, the father of the Appellant and Respondents. *Venkatadri* left a son *Karkotaka*, and in 1866 his mother and guardian brought a suit on his behalf against *Ankinidu* for a monthly maintenance of Rs.161 11*a*. 2*p*., which had been paid to her late husband *Venkatadri* from the estate of *Devarakota* Zemindari, and for arrears from the 1st of May, 1856, to the 1st of August, 1866. The Defendant pleaded that the maintenance was for *Venkatadri's* life only, and did not descend to his son. In the judgment of the Principal Sadr Amin it is said, " The parties have agreed that the zemindari descended to the eldest son," and the decision " that the Defendant be held liable to the payment of Rs.50 per mensem to the Plaintiff's minor son during the period of his minority" is founded upon the assumption that *Venkatadri* was by usage excluded from inheritance. No objection appears to have been made to this judgment being admitted in evidence, if it could have been made successfully.

The question whether an estate is subject to the ordinary Hindu law of succession, or descends according to the rule of primogeniture, must be decided in each case according to the evidence given in it. In this it appears that the claim of the Plaintiff under the ordinary Hindu law has been answered, and that the decree of the District Court disallowing the claim ought not to have been reversed. Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the High Court, and to affirm the decree of the District Court, with the addition of the costs of the appeal to the High Court.

The Respondents will pay the costs of this appeal.

Solicitor for Appellant : *R. T. Tasker.*

Solicitors for Respondents : *Lawford, Waterhouse, & Lawford.*

(1) 12 Moore's Ind. Ap. Ca. 35.

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AND

RANI LALONMONI AND ANOTHER . . . DEFENDANTS.

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July 10, 26.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Indian Evidence Act, 1872, *s.* 83—*Effect of Admission in a Mortgage Deed.*

Where a mortgage deed, signed by the defendants or their predecessors in title, specified the quantity of debuttur land in a particular mouzah which should be excluded from its operation :—

Held, that the admission as to quantity so made was of great weight, and could not be met by shewing that a thakbust map made at a survey prior in date to the mortgage stated a greater quantity of such land, it appearing that the survey was made by an amin appointed to lay down boundaries, but without authority to decide what lands were debuttur.

Sect. 83 of the *Indian Evidence Act*, 1872, does not make *ex parte* statements of proprietors or tenants at such survey evidence as to the character of the holding.

APPEAL from a decree of the High Court (July 24, 1885) modifying a decree of the Second Subordinate Judge of *Hooghly* (Dec. 21, 1882) on appeal and cross-appeal.

The suit was brought by the appellant and her zemindar *Maharaja Jotindra Mohun Tagore*. The appellant was putnidar, bound by her putni grant to protect the estate, lot *Mohamed-aminapore*, from encroachment, and defray all costs of suit.

The broad question was whether the lands in suit were included in a mortgage of the 6th of October, 1871, under which the plaintiffs claimed, or were excluded from it as debuttur lands, as the defendants contended.

The lands in suit were included in mouzah *Seoraphuli*, and the plaintiffs contended that by the deed in question that mouzah was mortgaged to them less its debuttur lands, which were expressly limited to the specified area of 87 bighas.

The defendants contended that the lands in suit were their "ancestral rent-free debuttur lands, which had been confirmed by the authorities, and their rents appropriated for the worship of several gods and goddesses," and that they were not included

**Present* :—LORD WATSON, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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in the mortgage; further, that they were not bound by or limited to the eighty-seven bighas mentioned in the mortgage deed, but that they were entitled to any area in excess of that amount which they could shew that they had previously held as debuttur.

The Subordinate Judge accepted the view of the plaintiffs; the High Court accepted that of the defendants. The latter Court held that, on the proper construction of the mortgage deed, the intention of the parties was to mortgage only the zemindari, and to exclude from the mortgage all debuttur lands, whatever the area might be, if "proved to be valid debuttur"; and that "the specification of the quantity of debuttur land did not enlarge the actual area of the mal lands agreed to be hypothecated."

In deciding accordingly on what was valid debuttur, the learned Judge said that the measurement chittas made in the course of the resumption suit of 1841—5, would, if procurable, have been the most satisfactory evidence; but as those chittas could not be found, the next best evidence was the thakbust map of 1869, which they thought had been erroneously rejected by the first Court, as the correct guide under sect. 83 of the *Indian Evidence Act*, 1872, unless proved to be inaccurate, which it had not been; the evidence of the defendants shewing that the lands in suit had been held by the defendants as debuttur prior to that time.

Cowie, Q.C., and *Doyne*, for the Appellant.

Branson, for the Respondents.

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July 26.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

By a mortgage dated the 6th of October, 1871, to secure the repayment of Rs.1,50,000 and interest, *Srimati Lalonmoni Dasi* conveyed all her share and interest, and *Girindra Chunder Roy* released, conveyed, and assured all his share and interest, as well as confirmed the share and interest of *Lalonmoni Dasi*, unto *Doorga Churn Law*, his heirs and assigns, according to the nature and tenure thereof, of and in an undivided moiety or eight-annas

share of and in a large number of mouzahs, of which the names were stated, which taken collectively were said to compose the zemindari called and known as kismut pergunnah *Mahomedaminapore*, in the zillah or district of *Hooghly*, save and except the debuttur lands therein comprised, namely (this word being followed by a list of the mouzahs), and against the name of each the quantity in bighas and cottahs of land excepted, making a total of 4992 bighas 3 cottahs. Amongst the mortgaged mouzahs is one called *Sharapuli* or *Seoraphuli*, and the quantity of debuttur land set against its name is 87 bighas. A suit having been brought by the mortgagee against the mortgagor for realization of what was due to him, and a decree obtained, the property was attached and sold by auction, and was purchased, in the name of his son, by *Rai Luchmiput Sing*, who obtained a sale certificate, and possession was given to him. He afterwards sold the property to *Maharaja Jotindra Mohun Tagore*, who granted a putni thereof to the Appellant. The suit was brought by the Appellant and the Maharaja, who has no immediate interest, against the mortgagors, to recover possession of parts of the mortgaged property, including *Seoraphuli*, of which the Defendants were in possession, and the defence was that the properties claimed and mentioned in the schedule to the plaint were not mortgaged, and that certain of them, including *Seoraphuli*, were rent-free debuttur properties.

The present appeal relates only to *Seoraphuli*, and the question in it is whether the debuttur land in *Seoraphuli* exceeded 87 bighas. The mortgage deed conveyed all the land in the mouzahs which was not debuttur, and the statement of the extent of the debuttur land comprised in the mouzahs was a deliberate admission by the mortgagors, the Defendants, which imposed upon them the burden of proving that it was untrue, or that they were not bound by it. It was admitted on behalf of the Defendants that they had no original deed of endowment, and they relied on a resumption decree dated the 6th of June, 1845, from which it appeared that 5618 bighas 16 cottahs debuttur lands, situated in *Burdwan*, resumed by the Deputy Collector by his decree dated the 26th of June, 1837, were released as debuttur to the ancestors of the Defendants, on condition of their

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appropriating the proceeds thereof to deb-sheba. The decision in the resumption suit mainly rested on a chhar chitta of *William Lushington*, Esq., in 1770, and a letter of the Collector of the District of *Nuddea* in 1791, it appearing from the decision that the quantity of debuttur lands of each village was mentioned on the back of the chhar. This had been filed in 1880 in a suit in the Small Cause Court at *Serampore*, and there was evidence of its having been returned to one of the Defendants' servants in that year. The Plaintiffs gave the Defendants notice to produce various papers, including the chhar. It was not produced, and the Subordinate Judge held that, in its absence, he must adopt the area of the debuttur lands as described in the mortgage deed as the real quantity of debuttur lands excluded from its operation, and made his decree accordingly. The decree included many properties, and both parties appealed to the High Court. That Court allowed the Defendants' appeal as regarded *Seoraphuli*, called Plot No. 1, and modified the decree of the Lower Court, and the present appeal is against this decision. The judgment of the High Court appears to be founded upon a thakbust map made in a survey in 1869, which the learned Judges said they were of opinion "should be taken as the basis of the decision" of the question of the identity of the debuttur lands, unless it was displaced by any better evidence, and they appear to have held that it lay upon the Plaintiff to rebut the evidence of the map. The statements in this map of lands being debuttur appeared on the face of it to have been made, as was pointed out by agents on behalf of the proprietor of the mouzah and the principal tenants, in the presence of the agents of the holders of estates in the neighbouring mouzahs. The amin who made the map had to lay down boundaries, but had no authority to decide what lands were debuttur. The value of the map must depend upon the inquiry which was made by the amin, and the statements of what lands were debuttur may have been and probably were given by the Defendants' agents, no one being present to question the accuracy of them. Sect. 83 of the *Indian Evidence Act* has not the effect which the High Court gives to it, of making those statemente evidence. Their Lordships agree with the Subordinate Judge in the view which he

took of the thakbust map, and are of opinion that it was of no weight against the admission in the mortgage deed. Nor do they see that the decision of the Subordinate Judge proceeded upon an erroneous construction of the recital in the deed. The entire mouzah *Seoraphuli*, except debuttur land, was conveyed, and it lay upon the Defendants to prove that the 87 bighas set against *Seoraphuli* was a mistake, and that there was a greater quantity of debuttur land in that mouzah. Whether or not they could have produced the chhar chitta and purposely refrained from doing so need not be inquired into. The evidence was not sufficient to shew that their admission ought not to be taken as proof of the Plaintiff's case. Such an admission as that is entitled to great weight, and should be met by satisfactory evidence.

Their Lordships will humbly advise Her Majesty to reverse the decree of the High Court so far as it modifies the decree of the Subordinate Judge, and dismisses the Plaintiff's suit, and orders the Plaintiff to pay costs, and to order the Defendants to pay the costs of the appeal to the High Court, and the costs of the suit in the Court of the Subordinate Judge as ordered by his decree. The Respondents will pay the costs of this appeal.

Solicitors for Appellant : *Barrow & Rogers.*
Solicitors for Respondents : *Watkins & Lattey.*

J. C.* 1890 — June 25; July 1, 12.

MAHARAJA RADHA PARSHAD SINGH . DEFENDANT;

AND

LAL SAHAB RAI AND OTHERS . . . . . PLAINTIFFS.

TWO CONSOLIDATED APPEALS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Execution—Operative Decree for Mesne Profits—Parties—Civil Procedure Code, c. 7—Effect of dismissal of Suit for non-appearance of Plaintiff.

Where by a decree in 1856 certain co-parceners, of whom the Respondents' ancestor was one, were directed to give up possession to the Appellant, and declared liable for mesne profits (whether jointly or severally not being stated), and it appeared that the extent and quality of that liability were not ascertained till 1877 (after the death of the ancestor), when the Appellant for the first time obtained a money decree capable of execution :—

Held, in a suit by the Respondents for relief against the attachment and sale of their ancestral property in execution of the decree of 1877, that not having been made parties to the proceedings in which such money decree was passed, they were not bound thereby.

A similar suit having been instituted by the Respondents in another Court in regard to other property and dismissed for default of appearance, without any of the questions raised by the pleadings being heard and determined :—

Held, that such dismissal did not operate as *res judicata* in respect of the questions of fact or law raised in this suit, the severest penalty enacted by the Code of Civil Procedure, c. 7, being that another suit for the same relief was barred.

CONSOLIDATED APPEAL from two decrees of the High Court (May 4, 1887), one of which reversed a decree of the Subordinate Judge of *Ghazipur* (July 21, 1885), and decreed the Respondents' suit as prayed, and the other dismissed a cross-appeal of the Appellant.

The facts of the case and the proceedings in the original suit, and also in the present suit, are sufficiently stated in the judgment of their Lordships.

The question decided in the appeal was as to the liability of the Respondents' ancestral property to attachment and sale in

*Present:—LORD WATSON, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

execution of a money decree for an ascertained amount of mesne profits. The ancestor of the Respondents had been a party to the original decree for possession, which had declared in general terms the liability of the Defendants to mesne profits; but neither he nor the Respondents had been parties to the proceedings by which the amount of that liability had been ascertained and adjusted.

Doyne and *Mayne*, for the Appellant.

Graham, Q.C., and *Cowell*, for the Respondents.

The judgment of their Lordships was delivered by

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July 12.

LORD WATSON:—

The suit in which these consolidated appeals are taken was instituted by *Lal Sahab Rai* and others, the Respondents, before the Subordinate Judge of *Ghazipur*, in March, 1882, for the purpose of obtaining relief against the attachment and sale, at the instance of the *Maharaja Radha Parshad Singh*, the Appellant, of certain shares of immoveable estate in taluk *Narhi* and elsewhere, in satisfaction of a judgment debt alleged to be due from their ancestor, *Jhanguri Rai*. The Respondents are the six sons of *Jaipargash*, the only son of *Jhanguri*, who was one of the five sons of *Achraj Rai*, a pattidar of *Narhi*; and the shares sold in execution by the Appellant were the ancestral property of the Respondents, being one-fifth of the interest which belonged to their great-grandfather, *Achraj Rai*.

In order to appreciate the relative position of the litigants and the merits of the controversy raised by these appeals, it is necessary to revert to the legal proceedings in which the decrees were obtained which formed the warrant for the attachment and sale against which relief is sought.

Taluk *Majharya*, now belonging to the Appellant, and taluk *Narhi*, already mentioned, are situated on opposite banks of the Ganges, *Majharya* being on the *Shahabad*, and *Narhi* on the *Ghazipur* side of the river. Disputes arose between the proprietors of these two taluks with respect to the ownership of 1589 bighas of alluvial land which had been deposited by the

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action of the river on its *Shahabad* side; the proprietors of *Narhi*, who appear to have been in possession, alleging that the disputed land was a re-formation upon a denuded area which originally formed part of their taluk. Consequently the *Maharaja Buksh Singh*, father and immediate predecessor of the Appellant, brought, in 1855, an action against 264 Defendants, pattidars of *Narhi*, before the Civil Court of *Ghazipur*, for recovery of the disputed bighas, and for mesne profits. The judicial record of that action perished in the Mutiny; but copies of the written statement lodged for fifty-seven pattidars who appeared to defend, of their petition for leave to file documents, and of the ultimate decree passed by the Civil Judge of *Ghazipur*, have been produced and admitted without objection in this suit.

The decree, which is dated the 14th of April, 1856, assigned the disputed land to the Maharaja, and fixed its boundaries; and also found that he was "entitled to mesne profits from the date of the Deputy Collector's order until he recovers possession." An appeal was taken by some of the Defendants to the Sudder Court, who, on the 29th of November, 1859, varied the boundaries fixed by the Subordinate Judge favourably to the Defendants, and directed "that mesne profits be adjusted accordingly." The Maharaja presented a petition for review, upon which the Sudder Court, on the 7th of April, 1860, modified its previous decision with respect to boundaries, in his favour. An appeal was then taken by the Defendants to this Board, which was dismissed on the 31st of March, 1870, for want of prosecution. It is unnecessary to notice further these proceedings by way of appeal, because the decrees pronounced in them had reference merely to the extent of the land which the Maharaja was entitled to recover, and did not disturb the general finding of the Subordinate Judge of *Ghazipur* in regard to mesne profits.

It having been judicially determined that the disputed land formed part of talook *Majharya*, the action was, after the dismissal of the appeal to this Board, transferred to the Court of *Shahabad*, the district in which that talook is situated. In 1874 the Maharaja was put in possession of the land in pursuance of the decree of the Sudder Court; but the question of mesne profits was not finally disposed of until 1877. On the 1st of

March, 1877, the Subordinate Judge issued an order, which has become final, fixing the amount of mesne profits and costs due to the Appellant, as successor of the Maharaja, at Rs.10,69,667, for which he gave decree jointly against all the parties whose names then appeared as Defendants to the action.

In June, 1878, an order issued from the *Shahabad* Court for attachment of the interests of the judgment debtors in mehal *Umarpur*, in satisfaction of these mesne profits and costs of suit. In the course of the proceedings the Respondents applied to have a 2 ganda 2 kauri $2\frac{1}{4}$ dant share, which they alleged to belong to them, struck out of the inventory; but their objection was overruled, and the property sold in execution. The Respondents then brought a regular suit for relief against the attachment and sale, in which they alleged that their share of the mehal was ancestral property, and that neither they nor their ancestors were judgment debtors in the decree executed, or in any way liable under it. The suit was resisted by the Appellant, on the grounds that the Respondents had no interest in *Umarpur*, and that they were not the representatives of *Jhanguri* and *Jaipargash*. After adjustment of issues, the action was dismissed with costs on the 21st of July, 1881, because of the Respondents' failure to adduce evidence in support of their allegations; and the Respondents took no steps to set aside that order, which has consequently become final. It would hardly have been necessary to refer to these proceedings in execution, had it not been for the fact that the Appellant relies upon them as constituting *res judicata* in the present suit.

On the 1st of March, 1881, the Appellant instituted proceedings for execution in the Court of *Ghazipur* against property of the judgment debtors situated in that district, stating in his application (1) the names of the judgment debtors, and (2) the names of those against whom his decree was sought to be executed. Amongst the former there occurs the name of "*Chakauri Rai*," which is synonymous with "*Jhanguri Rai*"; and amongst the latter the names of all the Respondents, who are described as "sons of *Jaipargash Rai*, deceased, heirs of *Chakauri Rai*, grandson of *Achraj Rai*." So that in these proceedings the Appellant rightly attributed to the Respondents the character of heirs of

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Jhanguri and *Jaipargash*, which he denied that they possessed in his previous execution suit. The Respondents lodged objections, praying for release of their interest, on the ground that it belonged to them, "and they were in possession thereof, and the judgment debtors had no concern with it"; but these objections were repelled by the Subordinate Judge of *Ghazipur*, on the 10th of March, 1881, in respect of their having been once before raised by the same persons in the Court of the Sub-Judge of *Shahabad*, and there disallowed.

On the 3rd of March, 1882, the Respondents brought the present suit, in which there has been an unusual amount of litigation. Their cause of action is thus stated in the plaint: "The judgment debtors have no connection or concern with this property, nor are the Plaintiffs or their ancestors debtors under the decree under execution." In his written statement the Appellant averred that the decree of the 14th of April, 1856, and subsequent proceedings in execution, were taken against *Jhanguri Rai* and his son *Jaipargash Rai*, and that these persons being judgment debtors, the property, being ancestral, was liable to attachment for their debt. He also pleaded that, according to the provisions of sects. 13 and 43 of Act X of 1877, the claim put forward by the Respondents was no longer cognizable, inasmuch as it had already been adjudicated upon, in a regular suit, before the District Court of *Shahabad*.

The cause was tried upon six issues, which need only be noticed in so far as they relate to the main question raised in these appeals :—

"III. Is the claim of the Plaintiffs barred by sects. 13 and 43 of the Code of Civil Procedure?

"IV. Are the Plaintiffs or their ancestors liable for the judgment debt, and is the property liable to sale or not?"

The Subordinate Judge, upon the 21st of December, 1882, sustained the Appellant's plea in bar, and dismissed the suit with costs. His decree was carried by appeal to the High Court of the *North-Western Provinces*, by whom it was reversed on the 9th of May, 1885, and the case remanded to the Sub-Judge for disposal on the merits. As the decision of the High Court on that

occasion has been impeached in these appeals, it may be convenient to state here that, in the opinion of their Lordships, it was well founded. None of the questions, either of fact or law, raised by the pleadings of the parties, was heard or determined by the Judge of the *Shahabad* Court in 1881; and his decree dismissing the suit does not constitute *res judicata* within the meaning of the Civil Procedure Code. It must fall within one or other of the sections of Chapter VII of the Code; in the present case it is immaterial to consider which, the severest penalty attached to such dismissal in any case being that the Plaintiff cannot bring another suit for the same relief. Assuming that the Respondents are barred from seeking relief against the attachment and sale of their interest in mehal *Umarpur*, the decree of the 21st of July, 1881, does not disable them from claiming relief against the attachment and sale of their interest in *Narhi*, or in any other property which was not included in the judicial sale of *Umarpur*.

Acting under the remit made to him by the High Court, the Subordinate Judge, on the 21st of July, 1885, found as matter of fact that the Respondents' ancestor, *Jhanguri Rai*, was a Defendant in the suit of 1855, and was one of the parties decerned against, as liable for mesne profits by the judgment of the 14th of April, 1856. Upon that finding the learned Judge dismissed the Respondents' suit with respect to one-half of the interests claimed by them, but sustained it with respect to the other half, which he held to have been vested, by force of Hindu law, in their father *Jaipargash*, who was admittedly not made a party to the proceedings of 1855 and 1856 at the instance of the Maharaja. Against that decision both parties appealed to the High Court, who, on the 5th of August, 1886, made an order remanding the case for the trial of the following points, and distinct findings upon them :—

(1.) Was *Jhanguri Rai*, the grandfather of the Plaintiffs, a co-sharer, or in possession of the lands to which the litigation of 1855 related, and which ended in the decree of the 14th of April, 1856 ?

(2.) If so, was any process of Court in that litigation issued or served upon him ?

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(3.) When did the Defendant first seek to execute his decree against the Plaintiffs, either at *Ghazipur* or *Shahabad*; and were they or any of their ancestors, viz., *Jaipargash* or *Jhanguri*, parties to the execution proceedings which ended in possession of the property in suit, to which the decree of 1856 related, being given to the Defendant by proceedings which ended on the 12th of July, 1874?

Their Lordships entertain serious doubts whether the Court was justified in making the remand, by the provisions of sect. 566 of the Civil Procedure Code. All the points remitted were substantially covered by the issues which had been previously sent for trial in the Court below; and it appears to their Lordships that there were sufficient materials for the decision of the case, to which little or nothing has been added by the evidence taken on remand.

On the 20th of November, 1886, the Subordinate Judge found upon the several points referred to him by the High Court. Upon the first point he found that *Jhanguri* was a coparcener and in possession at the dates specified; upon the second, that the issue of process to *Jhanguri* was not proved; and, upon the third, that it was not clearly proved that *Jhanguri* was a party to the proceedings in execution which resulted in possession of the disputed property being given to the Maharaja in the year 1874.

These findings, together with the oral evidence taken on remand, were duly submitted to the High Court, who, on the 4th of May, 1887, reversed the Subordinate Judge's decree of the 21st of July, 1885, and gave judgment for the Respondents in terms of their plaint, with costs. The decision of the Court was delivered by Mr. Justice *Straight*, *Mahmud*, J., concurring. Their Lordships agree with the conclusion at which these learned Judges arrived, although they are unable to concur in all the reasoning upon which it is based.

Mr. Justice *Straight* says, with reference to a statement made by the Respondents' pleader on the 27th of September, 1882, "It seems to me, so far as the Plaintiffs were then concerned or are concerned now, the sole position for which they have con-

tended, was that their ancestor *Jhanguri*, was not the judgment debtor under the decree of the 14th of April, 1856." And the learned Judge adds: "The whole matter, therefore, between the parties resolves itself into the single question of fact—Was or was not *Jhanguri*, the ancestor of the Plaintiffs, a judgment debtor under the decree of the 14th of April, 1856?" The statement in question was not intended to be, and was not, a rehearsal of the whole facts relied on by the Plaintiffs, but was made by their pleader in answer to specific questions put to him by the Subordinate Judge; and the issues which went to trial were not confined to that statement, but raised the general question whether the ancestors of the Plaintiffs were judgment debtors under the decree by virtue of which the Respondent had attached and sold their interest in the lands of *Narhi* and others. That misconception of the real issue probably led to the remand of the 5th of August, 1886, and it certainly induced the High Court, in its ultimate decision upon the merits of the case, to deal with many points which do not appear to their Lordships to require consideration.

The Respondents endeavoured to prove that *Jhanguri Rai* predeceased his father *Achraj* some time before the year 1840; but their evidence on that point does not appear to be reliable, and their Lordships are disposed to think that the Subordinate Judge was right in holding that *Jhanguri* was a coparcener in possession at the date of the decree of 1856, and was alive for many years afterwards. The terms of that decree, as well as of the written statement for the Defendants, and of their petition for leave to file documents,—in all of which the name of *Jhanguri* occurs in connection with the whole other descendants and heirs of *Achraj Rai* then in life,—afford *prima facie* evidence that he was a party to the suit, and was included in the decree itself. Whether that inference is displaced by antecedent evidence derived from the pattidari papers of 1840, their Lordships do not think it necessary to determine. In their opinion, it is an obvious mistake to assume that the right of the Appellant to take the Respondents' land in execution for mesne profits wholly depends upon the fact of their ancestor being a party to the decree of 1856. None of the Defendants were by

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that decree made judgment debtors for mesne profits, in the sense that their property could be attached by virtue of it. The decree, no doubt, found that Defendants in the suit were accountable for mesne profits, and by that finding they were bound; but it did not ascertain the amount of such profits, or determine the important question whether the Defendants were liable jointly or severally in respect of their wrongful possession. There was no adjudication upon any of these matters until March, 1877, when for the first time the Appellant obtained a money decree which was capable of being put into execution. But, according to the testimony of the Appellant's own witnesses, *Jhanguri* died at least twelve months before that date. It does not clearly appear whether his son *Jaipargash* was then alive; but it is mattter of certainty that neither *Jaipargash* nor the Respondents were made parties to the suit in room of *Jhanguri*.

An operative decree, obtained after the death of a defendant, by which the extent and quality of his liability, already declared in general terms, are for the first time ascertained, cannot bind the representatives of the deceased, unless they were made parties to the suit in which it was pronounced; and their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court ought to be affirmed. The Appellant must pay to the Respondents their costs in these appeals.

Solicitors for Appellant : *Burton, Yeates, Hart, & Burton.*

Solicitors for Respondents : *Ranken Ford, Ford, & Chester.*

KALI KISHORE DUTTA GUPTA MOZOOMDAR . . . . . } PLAINTIFF;

AND

BHUSAN CHUNDER. . . . . DEFENDANT.

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July 2,3,4, 26.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Action of Ejectment—Onus Probandi—Evidence.

In a suit for possession after establishment of the Plaintiff's right by inheritance :—

Held, that the judgment of the Subordinate Judge was very unsatisfactory in that it erroneously assumed the Plaintiff's right by inheritance, called on the Defendant in possession to prove his title, and found, contrary to the whole weight of evidence, that the Defendant's title thereto as the legally adopted son of the last owner was not proved.

APPEAL from a decree of the High Court (August 13, 1887), reversing a decree of the Subordinate Judge and Deputy Commissioner of *Goalpara* (July 27, 1886).

The subject of dispute was the estate of *Juggut Chunder Dutt*, who died childless on the 5th of April, 1867, leaving as his heiress his widow, *Bama Soondari Gupta*, who died on the 7th of July, 1877.

This estate the Appellant claimed as next reversionary heir of *Juggut Chunder Dutt* at the time of the death of *Bama Soondari*, and alleged by his plaint that the Respondent, who was in possession of all, or nearly all, that estate as a son of *Juggut Chunder Dutt*, adopted by *Bama Soondari*, under an alleged power from her husband, was not in fact or law such adopted son, as *Juggut Chunder Dutt* had not left any power to adopt, and *Bama Soondari* had never adopted the Respondent.

The substantial questions raised on the issues were : firstly, Was the Plaintiff the next reversionary heir of *Juggut Chunder Dutt* at the death of *Bama Soondari*, and as such entitled to challenge the title of the Defendant, who was in admitted possession ? And, secondly, supposing that the Plaintiff succeeded

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in proving his pedigree, was the Defendant the validly adopted son of *Juggut Chunder Dutt* ?

The Courts below arrived at directly opposite conclusions on both points. The first Court held that the Plaintiff's evidence established his alleged descent, and that the Defendant's evidence had failed to prove either that *Juggut Chunder Dutt* ever gave a power to his wife *Bama Soondari*, or that she ever conscientiously or validly acted under that alleged power and adopted the Defendant.

The High Court, on the other hand, held, on the first question, that the Plaintiff had failed to prove his alleged descent, and that the genealogical table on which he relied for that purpose " was entitled to no credit at all."

And on the second question, that the Defendant's evidence and also part of the Plaintiff's evidence, established that *Juggut Chunder Dutt* had given his wife, *Bama Soondari*, a power to adopt, and that the alleged copy of it, which the High Court admitted in the absence of the original, which was shewn not to be forthcoming, was a copy of the original power, and that *Bama Soondari*, " being in the full possession of all her faculties at the time," and not " moribund," or in a state of collapse, as contended by the Plaintiff, and found by the first Court, had exercised that power and validly adopted the Defendant.

Rigby, Q. C., *Houghton*, and *Robinson*, for the Appellant.

Sir *H. Davey*, Q. C., *Doyne*, and *Mayne*, for the Respondent.

The judgment of their Lordships was delivered by

1890

July 26.

SIR BARNES PEACOCK :—

This is an appeal from a decree of the High Court at *Calcutta* reversing a decree of the Subordinate Judge of *Goalpara*, who was also Deputy Commissioner of that district, and from two interlocutory orders of the High Court in the appeal to that Court from the Subordinate Judge.

The Plaintiff is the Appellant, and the Defendant the Respondent. Each of the parties claims to be heir-at-law of *Juggut*

Chunder Dutt Gupta Mozoomdar, deceased, who was an inhabitant of *Khagrabari*, in the station of *Dhubri*, in the said district.

Juggut Chunder died on a pilgrimage in the year 1867, without issue, leaving a widow, *Bama Soondari Gupta*, as his sole heiress. The precise date of his death is disputed, the Plaintiff's contention being that he died on a day in Falgoon, 1273, corresponding with the 7th of March, 1867, whilst that of the Defendant is that he died on the 24th of Cheyt, 1273, corresponding with the 5th of April, in the same year, 1867.

The parties were not agreed as to the age of *Bama Soondari* at the time of her husband's death. The Plaintiff makes her out to have been about nine years of age, whilst the Defendant puts her age at that time at twelve or thirteen. The point is not very material, and it may therefore be taken at nine, in accordance with the Plaintiff's view.

Bama Soondari died on the 14th of Assar, 1284, corresponding with the 7th of July, 1877, and that would make her about nineteen at the time of the alleged adoption. The Plaintiff's claim is that upon her death he succeeded to the property of *Juggut Chunder* as his second cousin and heir by collateral descent. The Defendant claimed as an adopted son of *Juggut Chunder*, and in that capacity obtained, by means of his guardian and manager, possession of the property in suit which belonged to *Juggut Chunder* at the time of his death. On the 27th of June, 1883, the Plaintiff, then a minor, by his guardian and next friend, filed his plaint, and, after alleging that he was in possession of certain portions of *Juggut Chunder's* property, claimed that the remainder, being that specified in the plaint, might be awarded to him after the establishment of his right thereto by inheritance. The 5th paragraph of his plaint contains the following allegation :—

"*Gunga Narain Gupta* was the manager of the properties left by *Juggut Chunder*, the deceased husband of the minor, *Bama Soondari*, on her behalf, till the time of her death, and did many fraudulent acts, even during her lifetime, with the vain hope of becoming the malik of the properties in dispute. Having failed in this, he at last, after the demise of *Bama Soondari*, entered into a conspiracy and fraudulent combination with *Ramanund*

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Mozoomdar, the brother of his father-in-law, and falsely set up his minor son, the Defendant, as the legally adopted son of *Bama Soondari*, with a view to keep in his own hands the properties left by the deceased *Juggut Chunder* and *Bama Soondari*, depriving the real heir, the minor Plaintiff. In fact, the minor Defendant is not the adopted son of *Juggut Chunder*, and *Bama Soondari* never took him as her adopted son; nor indeed had she any authority or right to adopt, nor had *Juggut Chunder* given her any permission to adopt."

The Defendant, by his guardian, put in a written statement, in which, amongst other things, he denied the Plaintiff's right of inheritance, and set up his own title as an adopted son.

The important issues recorded for trial were—

1st. Is the minor Plaintiff, *Kali Kishore Dutta Gupta*, the heir of the late *Juggut Chunder*?

2nd. Is the minor Defendant, *Bhusan Chunder*, *alias Bepin Chunder*, the legally adopted son of *Bama Soondari*, the deceased widow of the late *Juggut Chunder*?

At the trial the Defendant was called upon to prove his title as a son by adoption, notwithstanding the fact that the Plaintiff was out of possession, and could not have succeeded in the event of the Defendant's failure without proving his own title as collateral heir by descent. As remarked by the High Court :—

" From the judgment of the Lower Court it appears that the Subordinate Judge almost assumed the first issue in the Plaintiff's favour, for, after setting out the facts of the case, he says : 'The whole question, therefore, turns upon the inquiry, Was *Bepin Chunder*, Defendant, really adopted by *Bama Soondari* under a legally valid power to adopt, conferred upon her *bona fide* by her husband *Juggut Chunder*, or not ? If there was such a *bona fide* adoption, based upon a power to adopt duly and formally conferred by *Juggut Chunder* on his wife, then clearly the Plaintiff is at once out of Court. But if no adoption of the kind alleged ever took place, or if the form or outward ceremony of an adoption took place without the indispensable basis of a formally conferred power to adopt emanating from *Juggut Chunder Mozoomdar*, then the Defendant is at once put out of

Court, and the direct consequence is the establishment of the Plaintiff's right and title.' In other words, he proposed to make the establishment of the Plaintiff's title depend upon the failure or otherwise of the Defendant in proving the validity of his adoption."

Five witnesses deposed to the fact of *Juggut Chunder's* having given his wife an anumati patra. *Biseswari Gupta* stated that *Juggut Chunder* read it out and placed it in a box, and handed it to his wife. The witnesses stated that the anumati patra was executed in the month of Cheyt, 1273, before *Juggut* left home on his pilgrimage.

It was clearly proved, and in fact it was not disputed, that *Juggut Chunder* in the year 1867 left home on a pilgrimage to *Gaya* and *Benares*, and that he died in the district of *Monghyr* prior to arriving at his destination.

Soon after the death, *Chunder Nath Gupta*, who had a small interest as a co-sharer with *Juggut Chunder* in the zemindari pergunna *Taria*, gave notice of the death to the Government authorities, as he was legally bound to do; whereupon, in the month of May, 1867, the property of *Juggut Chunder* was attached, and on that occasion a closed tin box containing documents, which was then in the residence of the deceased at *Khagrabari*, was taken possession of by the sub-inspector of police of *Gowripore* and placed in an iron safe in his custody. The box and its contents remained in the custody of the police until the 6th of September, 1867, when, acting under an order of the Civil Court made upon the petition of *Bama Soondari*, a document, purporting to be an anumati patra signed by *Juggut Chunder* and attested by, amongst others, *Chunder Mohun Das*, found in the box was sent by the sub-inspector of police to the Deputy Commissioner, with a return under the seal of the sub-inspector to the following effect :—

" Incarnation of justice !

" In obedience to the order received, *Chunder Mohun Sen*, the uncle of *Bama Soondari Gupta*, was brought (to the station), and in his presence the closed tin box, which was attached, was opened, and on an inspection of the papers which it contained a closed cover to the address of the Registrar *Saheb Bahadoor* was

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sign his name to the anumati patra, and refused to do so, and that *Chunder Mohun Sen*, *Mritunjoy Bose*, and *Pudma Goswami*, who were then present, told him that they would cause his name to be written. This is a most improbable story, and is not at all in accordance with the Plaintiff's case as stated in the 5th paragraph of the plaint. If this statement were true, *Chunder Gupta*, *Chunder Mohun Sen*, and *Pudma Goswami* must have been conspiring together, when, in fact, it appears from other parts of the evidence that they were hostile to each other.

The witness was disbelieved by the High Court, and their Lordships consider that his evidence was wholly unworthy of credit.

Amongst other things the witness swore that, "when *Juggut Chunder* went on pilgrimage he did not, either at that time or before it, execute any will or anumati patra, nor did he grant any," and further, "that he had heard that as there was no anumati patra *Chunder Nath Mritunjoy Bose* and *Pudma Lochun* consulted together to fabricate one." Their Lordships cannot but remark upon the fact of the Subordinate Judge's having recorded as evidence such worthless statements. It is also worthy of notice that the document which the Defendant attempted to prove by the copy which was rejected was that which was seized by the police in the closed box and forwarded to the Civil Court, and which was in the custody of Government officers from the time of the attachment of the property in May, 1867, to February, 1870, and that the time at which *Chunder Mohun Das* states that he was requested to attest an anumati patra was about one month after the property was attached, or, in other words, whilst the document relied upon by the Defendant was in the custody of the police.

Another document, namely, a will of *Juggut Chunder*, was tendered in evidence by the Defendant and rejected by the Judge without referring to the evidence on the record in support of it. His reason for rejecting it, to use his own words, whatever may be the meaning attached to them, was, "*Juggut Chunder's* will was also put in, but refused admittance to the record on the ground of its inadmissibility under any definite section of the *Evidence Act*. It contains an allusion to an intention on the testator's

part to proceed on pilgrimage after having executed, or after executing, a deed of power to adopt ; but worded as it is, there is nothing to show definitely that such a deed of power ever was actually executed as a matter of fact."

The will was as follows :—

" To—

" The abode of all bliss, *Srijut Chunder Nath Gupta*, a co-sharer zemindar of pergunnah *Taria*, hissa half anna, inhabitant of *Khagrabari*.

" I, *Juggut Chunder Dutt Mozoomdar*, son of *Ramkant Mozoomdar*, deceased, a co-sharer zemindar of pergunnah *Taria*, inhabitant of *Khagrabari*, station *Gowripore*, in the district of *Goalpara*, do execute this will to the following effect :—

"I am starting for *Gaya* and *Benares* for the purpose of performing the necessary sradhs of my ancestors, of offering pindas to them, and of doing religious acts on my own behoof, after giving you the power to realize the rents of my zemindari in the said pergunnah, of my invalid lakheraj property in kismut *Uchita* and others, and of my purchased brahmottur and mowrussi jotes and other immoveable and moveable properties, to perform the sheba of the ancestral deities, to preserve the houses, to pay the debts and to collect the dues, to institute suits against any persons, and to register my name in the sudder and mofussil and to sign the same. No son or daughter has yet been born unto me. The human body is transitory ; no one can tell what may happen at any time. God forbid, but as I may die after going to the place of pilgrimage, I leave behind me an anumati patra to my wife, to adopt a son in order to the preservation of the pindas of my ancestors and myself. You are also the husband of my uterine sister and have always been living with your family in the same mess with me, and for a long time have been doing me good service by way of caring for my zemindari, &c. And there is also an unmarried niece (sister's daughter). As it is necessary for me to maintain them and you, I execute this will of my own accord and in a sound mind, to the effect that should I die after reaching the place of pilgrimage, you will take possession of a 1-anna share out of the 5-annas share which I have in the zemindari, and of a 1-anna share out of the 9-annas share which I have

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in the invalid lakheraj kismut *Uchita* and others, by registering your name in place of mine, and you shall enjoy the same down to son, grandson, daughter's son, &c., your heirs. With respect to my remaining 4-annas share in the zemindari and the 8-annas share in the invalid lakheraj, and with respect to the 3-annas share of the zemindari and the 3-annas share of the invalid lakheraj which I have obtained as a gift from my maternal grand-aunt *Srijuta Bhairabi Chowdhrani*, altogether with respect to the 7-annas share in the zemindari and the 11-annas share in the invalid lakheraj, and with respect to my purchased brahmottur, mowrussi jotes and others, which are in my possession and enjoyment, you shall, on my demise, cause a fit boy to be adopted from a good family or from out of my gyantis, by my wife *Bama Soondari Gupta*, and getting him recognized as heir, you shall manage the zemindari and all other properties till the minor attains his majority. If you or your son, grandson, or daughter's son, &c., be not living, the 1-anna share of the zemindari and the 1-anna share of the invalid lakheraj and others, which I have given you, shall be obtained by me, or by my son, grandson, whoever may be in existence. If I or my wife, son, grandson be not living, then the zemindari, &c., left by me shall be obtained by you, or by your son, grandson, and daughter's son, &c., whoever may be in existence. To the above effect I execute this will.

" The 7th Cheyt, 1273 B. S."

The will, if genuine, was a very important document, for it not only supported the evidence as to the anumati patra, but amounted to an assertion by *Juggut Chunder*, through whom the Plaintiff claims, that he had given power to his wife to adopt, which, in the absence of evidence to prove the revocation of the power, would, in their Lordships' opinion, have been sufficient to support the adoption. Further, the direction to *Chunder Nath* to cause a fit boy to be adopted by his wife would in itself, in the absence of an anumati patra, amount by implication to a power to his wife to adopt a fit boy from a good family.

It is very improbable that, if the will had been forged by *Chunder Nath* after the death of *Juggut*, he would have made the devise to himself of a 1-anna share in the zemindari and a one-anna share of the invalid lakheraj dependent upon a condition

which he must have known had never been performed, namely, the reaching by *Juggut Chunder* of the place of pilgrimage, *Juggut Chunder* having died on the journey to that place in the district of *Monghyr*. That condition is also an answer to the objection made on behalf of the Plaintiff that the will was never acted upon.

The Subordinate Judge then, having no evidence before him either of the original or of the copy of the alleged anumati patra, or of the alleged will, proceeded to deal with the whole case, and in the result expressed himself in the following terms. He said :—

"Upon a review of the whole of the evidence, I must confess that my faith has been utterly shaken in the evidence of the witnesses adduced on the Defendant's side, whereas I see no grounds whatever for discrediting those much-maligned *Mymensingh* witnesses, on the Plaintiff's side, who were examined by commission upon the subject of the Plaintiff's genealogical claims to inheritance. They are apparently permanent residents of the *Mymensingh* district, and, to all appearances, unbiassed by any *personal* interest in the results of the present suit.

"Of course, *either* of the genealogical tables might be a forgery and false concoction, without difficulty. But I see no good or reasonable grounds for condemning the *Mymensingh* table as such, whereas I *do* believe that the Defendant's table is a fabrication in its suspicious brevity.

"In fine, I find no difficulty in arriving at the conclusion that the Defendant's claims are absolutely *nil*, and that they are based, from first to last, upon fraud and forgery. That *some* sort of a mock ceremony, to act as a *quasi* adoption, actually *did* take place, I am quite willing to believe. But that what took place was really an adoption of the Defendant (then about *nine* years of age) by *Bama Soondari*, or that any real *bona fide* adoption by her would have been attended by no more respectable a concourse of the surrounding zemindars and other native gentry than the few who had any pretensions whatever to the claim of respectability, who are said to have been present on the occasion, is a most significant circumstance.

"My belief is that the unfortunate *Bama Soondari* was for

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long past utterly crushed, and made to live a living, lingering death by the iron rod of restraint wielded by *Gunga Narain* so pitilessly; and that, as far as the sham adoption is concerned, the unfortunate creature was wholly unconscious of what was going on around her, being in her last collapse, and about to breathe her last.

"There being no reason, therefore, for doubting the genuineness of the Plaintiff's claim in this suit, I decree the suit in Plaintiff's favour, with all costs."

The Subordinate Judge was silent as to the persons whom he considered to have been implicated in the fraud and forgery, or the witnesses upon whose evidence he relied in support of that finding.

The judgment of the Subordinate Judge is very unsatisfactory. There was no evidence to justify the belief which the Judge avowed "that the unfortunate *Bama Soondari* was for long past utterly crushed, and made to live a living, lingering death by the iron rod of restraint wielded by *Gunga Narain* so pitilessly; and that as far as the sham adoption is concerned the unfortunate creature was wholly unconscious of what was going on around her, being in her last collapse, and about to breathe her last." The Subordinate Judge did not even confine himself to the case before him, but went out of his way to declare his suspicions and throw out insinuations without the slightest evidence to warrant them. He said, "It is difficult to prevent one's suspicions of foul play from carrying one back as far as the time of *Juggut Chunder's* death, and suggesting to one's mind that very possibly he did not die a natural death. The ever-convenient cholera was at once put forward as the cause of his end, and this might or might not have been so." The Judge does not condescend upon particulars; *Gunga Narain Gupta*, described by him as an utterly unscrupulous character, was not with *Juggut Chunder* on his pilgrimage or at the time of his death, nor was he the person who reported that the death was the result of cholera. Upon whom could his suspicions be supposed to rest, except upon those or some of those who were with the deceased at the time of his death, and who reported that he died from cholera? Again, speaking of *Bama Soondari*, he says, "I do not feel much in the

way of scruples myself in suggesting another and more probable cause of her illness and death, and that is slow poison, resulting from her obduracy in refusing to adopt the Defendant." Again, "It is curious what a high rate of mortality appears to have been amongst vitally essential personages, such as the late manager, *Pudma Lochun*, in whose time the alleged unfortunate theft of the box said to contain the all-important deed of power to adopt is stated to have occurred: the attesting witnesses also to the important deed are all dead, and so on."

Hasty, uncalled for, and indiscreet expressions like these, casting suspicions of grave crimes against unnamed absent persons, without one tittle of evidence to support them, are wholly unwarrantable, and cannot but destroy respect for the judgment and discretion of the Judge, and lower the confidence which might otherwise attach to his decision upon the questions really before him.

The case was appealed to the High Court, and by two interlocutory orders of that Court made in the Appeal the copy of the anumati patra and of the deposition of *Gunga Narain* which was put in as part of the evidence for the Plaintiff were restored to the record. Those orders are also included in this Appeal. Their Lordships consider that the High Court was right in making them, and also in their finding that the anumati patra was executed by *Juggut Chunder*, and that the copy produced was a copy of the original which found its way into the Civil Court in the manner already stated.

The will of *Jugut Chunder*, which was rejected by the Subordinate Judge, and as to the genuineness of which he expressed no opinion, was produced, and proved to the satisfaction of the High Court. They gave credit to one of the attesting witnesses, *Krishna Nath Surma Roy*, and other evidence in support of it, and their Lordships see no reason to disturb their finding.

The High Court appear to their Lordships to have dealt very properly with the arguments urged on behalf of the Plaintiff, and the documents produced in support of the contention that both the will and the anumati patra were fabricated after the death of *Juggut Chunder*. With regard to the contention that the anumati patra and will were dated on days subsequent to the death of

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Juggut Chunder, it is impossible to believe, in the face of all the evidence in the case, that *Juggut Chunder* died in the month of Falgoon, 1273, and not on the 24th of Cheyt in that year, as alleged on the part of the Plaintiff in the plaint. It was inconsistent on the part of the Subordinate Judge to admit evidence to prove that *Juggut Chunder* died in Falgoon, 1273, after leave to amend the plaint had been refused.

On the argument before their Lordships much reliance was placed on the account, dated 15th Bhadro, 1274, or 30th of August, 1867, in which a sum of Rs.48 14*a*. was charged for the expenditure for the half-yearly sradh of *Juggut Chunder*. It was contended that, if *Juggut* died on the 5th of April, 1867, the time for the performance of the half-yearly sradh had not arrived on the 15th Bhadro, 1274; whereas, if he died on the 24th of Falgoon, 1273, or 7th of March, 1867, as alleged by the Plaintiff, the period for performing the half-yearly sradh was on the very day of the date of the account. Their Lordships do not attach any importance to that document. It seems that the half-yearly sradh may be performed at any time during the sixth month after the death, and calculating by lunar months five months and four days had elapsed since the 5th of April, 1867. The account is signed by *Chunder Mohun Sen*; but he was not the manager of *Bama Soondari's* estate, nor had he been appointed her guardian. The reason for his rendering an account is not explained. The account is also signed by the Extra Assistant Commissioner; but it does not appear what he intended to vouch by his signature.

It is impossible to believe that, if the will and anumati patra were forged, any of the persons interested in the forgery could have been ignorant of the date of the death, or would have forged documents dated a month later. Such an account as that now under consideration could never induce their Lordships to believe that *Juggut Chunder* died in Falgoon, in the face of the statement in the plaint that he died on the 24th of April, and of all the other evidence in the cause to which the Judges of the High Court have adverted.

The High Court referred to a genealogical table produced in support of the Plaintiff's title. They considered, for the reasons

given, that it was not entitled to any credit. The original document is not on the record transmitted to this Board, and their Lordships are unable, therefore, to form any opinion respecting it, or to say that the High Court came to an erroneous conclusion respecting the Plaintiff's heirship. They concur generally with the High Court in their findings upon the facts, and they will humbly advise Her Majesty to affirm the judgment of the High Court, and the interlocutory orders before referred to. The Appellant must pay the costs of the appeal.

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Solicitors for the Appellant : *Tatham, Son, & Lousada.*

Solicitors for the Respondent : *T. L. Wilson & Co.*

DEWAN RAN BIJAI BAHADUR SINGH . DEFENDANT ;

AND

RAE JAGATPAL SINGH . . . . . PLAINTIFF.

J. C.* 1890 *April* 29, 30.

CONSOLIDATED APPEAL AND CROSS APPEAL.

RAE BISHESHAR BAKSH SINGH . . . PLAINTIFF ;

AND

DEWAN RAN BIJAI BAHADUR SINGH AND RAE JAGATPAL SINGH . . . } DEFENDANTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Oudh Estates Act I *of* 1869, *ss.* 8, 22—*Heirs—Mother and Stepmother—Nearest Male Kin.*

An estate created by sannad and entered in lists No. 1 and No. 2 under s. 8 of Act I of 1869 descends according to the rules down in sect. 22, and as impartible estate.

On the death of the last male owner, who died a minor and unmarried, his mother succeeded as entitled to a woman's estate of inheritance, but his stepmother, who retained possession after his mother's death, did so as a trespasser, the nearest male heir to the last male owner being entitled to succeed under clause 11 of sect. 22 :—

Held, that certain villages in suit having been purchased by the step-

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* *Present* :—LORD WATSON, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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mother with the Defendant's money belonged to him, if purchased by her as a trespasser with the mesne profits of the estate, *quaere*, as to whether they would have been an augmentation of the estate so as to pass with it.

APPEAL and cross-appeal from a decree of the Judicial Commissioner (Nov. 1, 1886), whereby a decree of the District Judge of *Rae Barelli* (Jan. 19, 1885) was modified. The District Judge dismissed the suit ; the Judicial Commissioner disallowed a portion of it.

Further appeal from the same decree by *Bisheshar Baksh Singh*, as co-Plaintiff with *Jagmohan*, the father of *Jagatpal Singh*.

The facts are stated in the judgment of their Lordships.

Cowie, Q. C., and *Branson*, for *Dewan Ran Bijai*.

Rigby, Q. C., and *Doyne*, for *Jagatpal Singh*.

Mayne, for *Rae Bisheshar Baksh Singh*.

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The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

These appeals relate principally to a talook called *Dasrathpur*, which was created by a sunnud by the Governor-General after Lord *Canning's* proclamation, and as to which it was stated that it was a condition of the grant that it should descend to the nearest male heir under the rule of primogeniture. The estate was entered in the lists No. 1 and No. 2, established by sect. 8 of Act I of 1869 ; and consequently, according to a former decision of this Board, it descended according to the rules pointed out in sect. 22 of that Act. The last male owner of the estate was *Rudra Narain Singh*, who died in the year 1869 ; and according to clause 11 of sect. 22 it descended to the heir according to Hindu law. He died a minor without having been married, and his mother, *Kharaj Kunwar*, became his heir, and took a mother's interest in the estate, which is not an estate for life, but a woman's estate by inheritance. A mutation of names was made in which her name was entered together with that of *Saghu Nath*

Kunwar, who was the stepmother of the last owner of the talook, and who had no interest as an heiress. *Kharaj Kunwar*, the mother, died in the year 1879; but the stepmother, *Saghu Nath*, remained in possession up to the time of her death on the 21st of November, 1881. Upon her death *Ran Bijai Singh* took possession of the estate.

A question might arise upon the construction of clause 11 of sect. 22 whether the estate descended as an impartible estate. Their Lordships are of opinion, looking to the provisions of Act I of 1869, list 2, sect. 8 and sect. 22, that it was the intention of the Legislature that the estate should descend as an impartible estate.

The action out of which these appeals arise was brought by *Jagmohan*, who was the eldest son, and *Bisheshar*, who was the third son of *Pirthipal*, against *Ran Bijai* for the recovery of the estate of which he had held possession. They were the nearest relatives entitled to succeed, but for *Drigbijai Singh*, who was the second son of *Pirthipal*. *Drigbijai* was not made a party to the suit, though he was living at the time when it was commenced. He never claimed the estate. According to the construction which their Lordships put, and which seems to have been put in the Courts below, upon sect. 22, the estate descended as an impartible estate, and consequently *Jagmohan* and *Bisheshar* could not take jointly. Regarding the question, which of those two should take, it was rightly decided that *Jagmohan* was the proper heir if he was not excluded from inheritance in consequence of insanity. The question of *Jagmohan's* sanity or insanity appears, so far as the talook is concerned, to be the main question now before their Lordships. In the plaint he is described as insane, and he sued through his wife as his guardian. But the plaint, nevertheless, claimed that the estate had descended to him, and although he might be incompetent to commence the suit, or to proceed therein except by a guardian, it is no evidence, nor does it lead to any inference that he was not the heir at law, and that he was excluded from inheritance on the ground of insanity; the plaint, in which *Bisheshar* joined, goes on to state that "the Plaintiffs are *Sapindas*, being the sixth in descent from *Hirde Sah*, and under the ordinary rules of the Hindu law the Plaintiffs

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are the nearest male heirs and collaterals." *Jagmohan* could not have been an heir if he was excluded from inheritance. The plaint shews that *Jagmohan* was considered competent to inherit, and that he was not excluded by reason of insanity at the time when the succession opened, although he might have been insane at the time of the filing of the plaint.

Upon the question of his sanity many witnesses were called, and especially two medical men, Dr. *Bond* and Dr. *McReddie*. Their evidence varied, and the Judge of the first Court found that *Jagmohan* was not so insane as to exclude him from the right of inheritance. The learned Judge states: "I am of opinion that, from the evidence on record, the fact of *Rae Jagmohan Singh's* being insane so as to be declared disqualified to inherit the property in suit is not proved." Again he says: "In this case the important evidence is that of two respectable surgeons, one of whom has been produced by Defendant, and the other by Plaintiff. The evidence of Dr. *McReddie* is for Defendant, and that of Dr. *Bond* for Plaintiff. Both these gentlemen are civil surgeons; but withal their evidence is so conflicting that the conclusion to be arrived at therefrom can in no way be identical. Dr. *McReddie* has distinctly deposed that *Rae Jagmohan Singh* is insane; while Dr. *Bond's* evidence clearly indicates that *Rae Jagmohan Singh* is by no means insane; he is weak and idiotic" (he gives a native word for idiotic, which probably is not accurately translated), "and does not speak, but his body and mind are all right. In order to decide the case one way or the other, it is necessary to give preference to the evidence of one party over that of the other. I have read the evidence of both these gentlemen twice over, and after a careful consideration I am of opinion that preference should be given to the evidence of Dr. *Bond*."

Their Lordships have carefully considered the evidence of these gentlemen, and they concur in the view expressed by the Judge of First Instance, that the preference ought to be given to that of Dr. *Bond*, and that *Jagmohan* was not so insane as to be incapable of inheriting.

Mr. *Bond* states that he examined *Jagmohan*. He says: "I h ve seen *Rae Jagmohan Singh* three or four times within the

last eighteen or nineteen months. I do not remember the period of intervals between each visit, but my visits were not paid successively. There are no symptoms of paralysis now. It is possible he might have been struck with paralysis on a previous occasion, because his tongue is clogged. It happens in paralysis and from other causes. I did not examine him to ascertain why he lost his power of speech." Therefore Dr. *Bond* rather attributes his incapacity to speak to an attack which he may have had of paralysis than to insanity. On the other hand, Dr. *McReddie* speaks of his not replying to questions as one of the symptoms which induced him to believe that the gentleman was insane. He says : "I went to examine *Rae Jagmohan Singh* to *Birapur* a second time, as requested by the Court, on the 6th of June, 1882, but could not see him, as he was not at *Birapur* then. When I saw *Rae Jagmohan Singh* on the 29th of April, 1882, he was quite insane ; from his appearance he had been insane probably for a long time. His age being between sixty and seventy, it was very probable that he would never recover from his insanity. I could not say exactly how many years he had been insane, but probably for many years. I could not say with any certainty if he ever had any lucid intervals. He could make no difference between right and wrong, and could not manage his affairs." Their Lordships, in the course of the argument, called attention to the view of Dr. *McReddie* as to his not being able to distinguish between right and wrong. It appears that he gave no answers to the questions. It did not follow that he was not capable of distinguishing between right and wrong from his being incapable of answering the questions. He says, on cross-examination : "I judged his insanity from the appearance of his face and from his not replying to or understanding questions put to him, and from my experience of insane people." Then, again, to Defendant's vakil he says : "When I saw *Rae Jagmohan* his insanity seemed to be congenital ; but with a healthy woman a sane child might be born." This no doubt had reference to the fact of *Jagmohan's* having a son then living who was sane. Looking to the evidence of those two gentlemen, their Lordships agree with the first Judge that the evidence of Dr. *Bond* is more reliable than that of Dr. *McReddie*.

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Many other witnesses were called, and conflicting evidence was given on the subject of this gentleman's state of mind. Some say that he was insane; that he could not speak; that he pointed; and that if he wanted the revenue paid he made a pointing with his hand in some way; and so he did with reference to his servants; but it did not follow from that that he was insane; he was exercising his mind upon the subject although he did not express his thoughts by words—he expressed them by signs. If he was incapable of speaking, this expression of his ideas by signs did not necessarily shew that he was insane, if the orders which he gave by signs as to the payment of revenue or as to other matters were not those of an insane man.

A very important matter in considering his state of mind is the manner in which he was treated by his own family. None of his family, prior to the application for a certificate of insanity, long after the right to the succession had attached, ever treated him as insane. The priests allowed him to perform all his religious duties. He performed the oblations to his father, which, according to the religion of the Hindoos, would have no beneficial effect, and ought not to have been performed by him if he had been in a state of insanity. One of the principal reasons why, according to the Hindu law, insanity excludes from the right of inheritance is, that an insane person is incapable of performing religious duties, and because he is incapable of providing for the marriage of daughters, and other matters of that sort. But in this case this gentleman performed them all. His family never objected; the priests never objected. He is stated to have been present at the marriage of his daughter, although there is conflicting evidence upon that point. He himself was allowed to marry; he was married three times to ladies whose fathers would in all probability have refused to allow their daughters to marry an insane man, and by one of them he had a son who was not insane. All these circumstances, with reference to the mode in which he was treated by his family, appear to their Lordships to have considerable weight and considerable importance in deciding the question of his sanity.

The first Judge having found that he was not insane, the Judicial Commissioner, upon considering the evidence, came to a

contrary conclusion. One point to which the Judicial Commissioner attached very great importance was the will of his father, *Pirthipal*, in which the father stated that he was insane. The mere statement by the father in his will that his son was insane was no evidence upon which the Court could properly act in determining the question as to the son's exclusion from the right of inheritance upon the ground of insanity.

Looking to the evidence on both sides, their Lordships arrive at the conclusion that there were no sufficient grounds for the Judicial Commissioner reversing the finding of the first Court. *Drigbijai*, who was the next heir, has never claimed the estate. Why we are not told. If he believed that *Jagmohan* was insane and excluded from inheritance, the estate would have belonged to him. *Bisheshar*, the co-Plaintiff and younger brother of *Jagmohan*, never claimed the estate upon the ground that *Jagmohan* was excluded from inheritance, for he joined him in the suit, and stated that he was one of the heirs. He made a mistake at the time in considering that the estate went to two sons, whereas it was impartible; but he treated *Jagmohan* as a man who was competent to succeed by way of inheritance, and not as one who was excluded from inheritance by reason of the state of his mind. *Ran Bijai*, the Defendant, sets up the insanity of *Jagmohan*, not as shewing that he himself had a title in consequence of the insanity, but as a technical objection. His case is: "*Jagmohan* is insane, and not competent to inherit, and therefore I have a right to remain in possession until the right person sues me"—that is, until the sons of *Drigbijai*, who was the heir if *Jagmohan* is excluded, come forward and assert their right. But they do not come forward, nor do they claim the estate. It is, therefore, to be inferred that they do not consider *Jagmohan* to be excluded from the right to inherit.

That appears to their Lordships to dispose of the case so far as the talook is concerned. But another question was raised with regard to some villages. It appears that some villages were purchased by *Saghu Nath* before her death and whilst she was in possession of the talook, and that she had left those villages by her will to *Ran Bijai*, who took possession of them. Both Courts have concurred in finding that those villages were not purchased

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by *Saghu Nath* out of the profits of the estate, but that they were purchased by *Ran Bijai* in her name, and that he provided the money for their purchase. But, even if this had not been so, *Saghu Nath* was merely a trespasser upon the estate, and if she trespassed upon the estate and received the mesne profits, it is not clear that a Court of Equity would ear-mark those mesne profits, and say that because the mesne profits must have been expended in the purchase of the villages they necessarily passed with the estate. It is not the case of a widow inheriting and purchasing property out of the assets of the estate which she takes as widow, for those have been considered by law as an augmentation of the estate ; but this is the case of a stepmother who was not entitled to succeed to the estate, and who, if she disposed of any portion of the rents and profits, was disposing of them as profits which she had received as a trespasser.

Under these circumstances, their Lordships think that *Ran Bijai* is entitled to the villages.

In the course of the proceedings *Jagmohan* died, and *Jagatpal*, as his eldest and, their Lordships understand, his only son, was admitted to represent him in the appeal. But the Judicial Commissioner has awarded the estate to him as if he was the Plaintiff in the suit, whereas he ought to have awarded it to him as the heir and representative of his father, *Jagmohan*. In that respect their Lordships think that the decree of the Judicial Commissioner ought to be modified.

As regards the moveable property mentioned in the Judicial Commissioner's decree, their Lordships at the commencement of the argument asked what property was the subject of appeal, and it was stated by the learned counsel that the moveable property was not a subject-matter of the appeal. The Judicial Commissioner has awarded certain moveable property to the substituted Appellant, but it is not a subject of the appeal.

Their Lordships upon the whole will, therefore, humbly advise Her Majesty that the decree of the Judicial Commissioner be varied by describing *Jagatpal* as the "substituted Appellant, as representative of his father, *Jagmohan*," instead of describing him as "the minor Plaintiff," and, subject to such variation, that the decree be affirmed.

The Appellant, *Dewan Ran Bijai*, must pay the costs of his appeal.

In the appeal of *Bisheshar*, their Lordships will humbly advise Her Majesty that that appeal be dismissed. The Appellant must pay the costs of both the Respondents.

Solicitors for Appellant, *Ran Bijai* : *Watkins & Lattey.*

Solicitors for *Jagatpal Singh* : *Young, Jackson, & Beard.*

Solicitors for *Rae Bisheshar Baksh Singh* : *Barrow & Rogers.*

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BISHAMBHAR NATH AND OTHERS . . . APPELLANTS ;

AND

NAWAB IMDAD ALI KHAN . . . . RESPONDENT.

J. C.* 1890 *July* 8, 23.

SIX CONSOLIDATED APPEALS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Civil Procedure Code, 1882, *s.* 266 (*g*)—*Political Pension—Non-liability to Attachment and Sale.*

A monthly allowance which the Government of *India* has given a guarantee that it will pay, by a treaty obligation contracted with another sovereign power, is a political pension within the meaning of Civil Procedure Code, 1882, s. 266 (*g*) ; and as such is not liable to attachment and sale in execution of a decree.

Nawab Sultan Mariam Begum v. *Nawab Sahib Mirza* (Law Rep. 16 Ind. Ap. 175) followed.

Quaere, whether sect. 266 (*g*) covers pensions payable by a foreign State when remitted for payment to their pensioner in *India*.

SIX consolidated appeals from a judgment of the Judicial Commissioner (Sept. 2, 1887), reversing a judgment of the District Judge of *Lucknow* (March 14, 1887).

The question in all these appeals was, whether certain moneys payable to the Respondent by the Government of *India* and out of the Government Treasury at *Lucknow* were properly attachable by the respective Appellants in execution of money decrees held by them against the Respondent, having regard to the

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provisions of the *Pensions Act*, XXIII of 1871, s. 11, the *Oudh Wasikas Act*, XXI of 1886, and the Civil Procedure Code of 1882, sect. 266, sub-sect. (*g*).

The Respondent contended that the moneys were payable to him by the Government of *Lucknow* as a pension granted to his grandmother, *Malka Jehan*, Queen of *Oudh*, on political considerations, and continued to him and others, and were consequently exempted from attachment.

The Appellants contended, and the District Judge held, that the moneys in question were not payable as a political pension within the meaning of the Acts above mentioned.

The Judicial Commissioner held that those moneys were payable as a political pension within the meaning of the 266th section of the Civil Procedure Code, sub-sect. (*g*), and were therefore not attachable. But he was of opinion that they did not come within the scope of the *Pensions Act* of 1871, or of the *Wasikas Act* of 1886.

The facts are stated in the judgment of their Lordships.

Mayne (Sir *H. Davey*, Q.C., with him), for the Appellants, contended that the order of the Judicial Commissioner should be reversed and that of the District Judge restored. The payment sought to be attached was not a pension within the meaning of the *Pensions Act* of 1871, nor a political pension within the meaning of sect. 266 of the Civil Procedure Code. It was a settlement by the husband on the wife in the ordinary manner; the Government being made the instrument of carrying it into effect. Further, Act XXI of 1886 by implication excluded money payable under the loan of 1842 from those pensions which are exempted from ordinary civil process. Reference was made to *Nawab Sultan Mariam Begum* v. *Nawab Sahib Mirza* (1).

Doyne, for the Respondent, contended that the moneys sought to be attached in the Government Treasury were payable to the Respondent in respect of a political pension, and were, therefore, exempted from attachment under the *Pensions Act*, 1871, and the *Wasikas Act*, 1886. In the alternative, and assuming that they

(1) Law Rep. 16 Ind. Ap. 175.

were not within the provisions of either of those Acts, they were exempted under sect. 266, sub-sect. (*g*), of the Civil Procedure Code, 1882. No distinction can be drawn between the public and private property of a despotic sovereign like the King of *Oudh* ; and the allowance made by him was of the nature of a political pension, and was so recognised in the treaty with the British Government.

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Mayne, replied.

The judgment of their Lordships was delivered by

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July 23.

LORD WATSON :—

These are consolidated appeals at the instance of judgment creditors of the Respondent, *Nawab Ali Khan*, one of the heirs, according to Mahomedan law, of the late *Malka Jehan*, who was the principal consort of *Mohammad Ali Shah*, the last King of *Oudh*. In all of them the same question is raised for decision—whether a monthly allowance payable to the Respondent by the Indian Government, under an arrangement made between the King of *Oudh* and the Governor-General of *India* in the year 1842, is liable to be taken in execution for his debts.

Mohammad Ali Shah had, in 1838, advanced Rs.17,00,000 to the Government of *India*, in pursuance of a formal treaty, by which the latter undertook to apply the interest of that sum in payment of allowances to certain members of the royal family and household, including his spouse, *Malka Jehan*, and their respective heirs in perpetuity. In the treaty, these allowances are described as "pensions," and the persons entitled to them for the time being as "pensioners"; and on the failure of an original pensioner, and his or his heirs, the Government undertook to devote the lapsed pension towards the maintenance of a mosque selected by the King.

Mohammad Ali Shah subsequently advanced in loan to the Indian Government Rs.12,00,000, which he intended to settle as an additional provision for *Malka Jehan* and her heirs. Being apprehensive that the lady or her heirs might, if the note or acknowledgment of the loan were issued in her name, be "persuaded at some future period, by evil advisers, to sell the note

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and squander away the money," His Majesty, by letter dated the 4th of January, 1842, requested the Governor-General, instead of issuing a promissory note in name of *Malka Jehan*, to "pay to her and her issue in perpetuity the interest at the rate of 5 per cent. per annum—that is, Rs.5,000 a month, so long as 5 per cent. interest may be allowed, and afterwards such reduced interest as may be paid from time to time by the British Government." The letter made special reference to the guarantee or treaty of 1838, and the pensions thereby settled on the ladies of the royal family, and represented that compliance with the request which it preferred "will prevent any new guarantee being entered into, but will merely be the payment of a large sum of interest instead of a small one."

In reply to that communication the Governor-General, by a letter dated the 15th of February, 1842, intimated his pleasure "in concurring with the hearty desire and wishes" of His Majesty, and gave the assurance that an order would be duly passed for their execution.

A promissory note for repayment of the loan was issued in name of *Mohammad Ali Shah*, which appears to have been renewed, in similar terms, as of date the 30th of June, 1854. The letters which constitute the arrangement between His Majesty and the Government of *India*, with respect to payment of the interest to *Malka Jehan* and her heirs in perpetuity, contain no provision for disposal of the capital of the loan, in the possible event of their failure. Whether the capital would, in that event, be payable to the representatives of the King, or belong to the Indian Government, appears to their Lordships to be a question the decision of which, one way or another, cannot affect the character of the right conferred on *Malka Jehan* and her heirs by the arrangement of 1842, under which the fund is at present held and administered by the Government.

The Civil Procedure Code of 1882, sect. 266 (*g*), enacts that "Stipends and gratuities allowed to military and civil pensioners of Government, and political pensions," shall not be liable to attachment and sale in execution of a decree. If the share inherited by the Respondent of the interest on the loan of 1842, originally payable to *Malka Jehan*, be a "political pension"

within the meaning of that enactment, the case of the Appellants necessarily fails.

The Appellants argued, in the first place, that the allowance payable to the Respondent by the Indian Government is not a pension; and, in the second place, that, assuming it to be a pension, it is not a political pension in the sense of the Civil Procedure Code, inasmuch as it is not a pension bestowed by the Indian Government in respect of political services, or for political considerations.

In support of the first of these propositions, it was maintained that the arrangement of 1842 was in its nature akin to a deed of settlement, by which the King made a provision, out of his private estate, in favour of members of his family who had a natural claim upon him for maintenance. The argument ignores the fact that, under a despotic government like that of *Oudh* in 1842, there was really no distinction observed between State property and private property vested in the sovereign, and that all the estate of which he was possessed passed, on his decease, to his successor in the throne.

Their Lordships had occasion in a recent case (1) to consider the character and effect of the arrangement constituted by the letters passing between the King of *Oudh* and the Governor-General in 1842. Sir *Barnes Peacock*, who delivered the judgment of the Board, there said :—"Their Lordships concur with the Judicial Commissioner in the opinion that the King intended in 1842 to provide an additional pension for *Malka Jehan* of the same nature as that which he had already provided for her in the year 1838." Notwithstanding the argument addressed to them for the Appellants, their Lordships see no reason to alter or modify the views thus expressed by Sir *Barnes Peacock* on their behalf. The Governor-General, in assenting to the King's letter of the 4th of January, 1842, expressly agreed to apply the interest arising upon the new loan in augmenting the pensions already secured to the Queen and her heirs by the Treaty of 1838, such augmentation being subject to the same conditions and under the same guarantee as the original pensions.

(1) *Nawab Sultan Mariam Begum* v. *Nawab Sahib Mirza* (Law Rep. 16 Ind. Ap. 175).

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In that view it is impossible to say that the increase is not a pension, or that the heirs of *Malka Jehan*, the present recipients, have not been recognised as pensioners by the Government of *India*.

Then it is said that these payments by way of increment, although they may be pensions, are not political pensions within the meaning of the Code. The following passage, in the judgment already referred to, appears to their Lordships to be conclusive against this branch of the Appellants' argument: "It should be remarked that, although a settlement in the terms of the King's letter of 1842, creating pensions in perpetuity, could not under the Mahomedan law be validly made by a private individual, the arrangement of 1842 takes effect as a contract or treaty between two sovereign powers."

It is probable (although the point is not one which it is necessary to determine in this case), that the enactments of sect. 266 (*g*) of the Code were not meant to cover pensions payable by a foreign State, when remitted for payment to their pensioner in *India*; but these enactments certainly include all pensions of a political nature payable directly by the Government of *India*. A pension which the Government of *India* has given a guarantee that it will pay, by a treaty obligation contracted with another sovereign power, appears to their Lordships to be, in the strictest sense, a political pension. The obligation to pay, as well as the actual payment of the pension, must, in such circumstances, be ascribed to reasons of State policy.

Being of opinion that the Respondent's pension is protected from execution by the provisions of the Code, their Lordships consider it unnecessary to express any opinion with regard to his pleas founded on the *Pensions Act*, 1871, and the *Oudh Wasikas Act*, XXI of 1886.

In one of these appeals, a plea of *res judicata* was taken, upon the ground apparently that a ruling by the Judge in one application for execution ought to be held conclusive against the judgment debtor in every other application for execution of the same decree. The plea requires no further notice, because the decree or order upon which it is rested has not been produced.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgments appealed from. The costs of the Respondent in these appeals must be paid by the Appellants.

Solicitor for Appellants : *William Buttle.*

Solicitors for Respondent : *Young, Jackson, & Beard.*

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MAINA AND OTHERS. . . . . DEFENDANTS ;

AND

BRIJ MOHAN AND OTHERS. . . . . PLAINTIFFS.

J. C.*
1890
July 9.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Act I *of* 1877, *s.* 42—*Proof of Claim as alleged—Evidence.*

Where the respondents sued under Act I of 1877, sect. 42, for declarations that they, as the mutawallis or managers of the *Bisram Ghat*, were entitled to one-third of the donations given by pilgrims to the ghat, and that the appellants were not entitled thereto as the sole owners, and for consequential relief :—

Held, reversing the judgment of the High Court, that the suit was rightly dismissed. Even if the evidence shewed that the Plaintiffs had some rights in the Ghat, they had failed to prove the particular rights which they alleged, or their title to the particular relief claimed.

APPEAL from a decree of the High Court (Jan. 5, 1887), reversing a decree of the Subordinate Judge of *Agra* (June 30, 1885).

The Respondents were the Plaintiffs together with one *Changaji Lal*. In their plaint they alleged, amongst other things, that they were the head of the order of Sannadhias, and that the Appellants were the heads of the Mathurias living in the sacred city of *Mathra* ; that both sects had from time to time, beyond memory, carried on their religious oblations and ceremonies at *Bisram Ghat*, where, on the banks of the *Jamna*, they had temples or mundirs with idols in them ; that offerings given by the worshippers were appropriated in a certain specified manner ; but some of the Appellants, alleging that they alone were mutawallis

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or managers, had brought a suit for recovery of certain moneys, and under a fictitious compromise obtained a collusive decree in 1882 ; that in that and another collusive suit the Respondents' application to be made parties had been refused.

They prayed for a declaration of their rights as mutawallis and managers of the *Bisram Ghat* and all the temples attached to the same to the extent of one-third share, and that the Appellants were not sole owners and mutawallis of the said ghat.

The Subordinate Judge dismissed the suit, stating that his inspection of the locality convinced him that the Respondent Sannadhia Brahmins had no connection with *Bisram Ghat*, their place of worship being elsewhere, and that the two sects were bitter enemies and could not be expected to have a common place of worship.

The High Court found that the Respondents were admittedly the owners of several of the temples situate at *Bisram Ghat* at *Mathra* ; that it was clear from a photograph before the Court, that in order to enable them to use those temples which were ancient buildings, they must have from time immemorial used the ghat constantly and uninterruptedly, and the steps adjacent thereto ; that the Respondents claimed as Sannadhia Brahmins and a section of the Chaubey class a right to use and enjoy the ghat in the same way as the Appellant Mathurias did.

That it was virtually conceded that if they belonged to the Chaubey sect they were entitled to the privileges they claimed ; and the High Court, referring to a firman proved in the case and Plaintiffs' oral evidence, concluded that they did belong to the Chaubey class, " and no evidence is shewn to us on behalf of the Respondents to contradict that produced by the Appellants."

The High Court accordingly decreed as prayed.

C. W. Arathoon, for the Appellants.

The Respondents did not appear.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This was a suit brought by the Respondents and another for a decree declaratory of their right in a ghat, and also for certain

relief specified in their plaint. The suit is governed by Act I of 1877, the 42nd section of which deals with declaratory decrees. By that section it is enacted that "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right; and the Court may in its discretion make therein a declaration that he is so entitled; and the plaintiff need not in such suit ask for any further relief. Provided that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so." The Plaintiffs, representing the body of a sect called Sannadhias, set out in their plaint what they considered to be the rights of that sect, and they stated therein their grounds for asking for a declaratory decree. In paragraph 6 they say: "That *Bindraban Das*, when he was alive, laid out Rs.100 in the repairs of the ghat. He died at *Mathra* on or about the 5th of October, 1879. When he was alive he deposited Rs.900 with *Bhagwan Das*, with instructions to use the money in the repairs of the *Bisram Ghat*; and *Bhagwan Das* having failed to use the money in the repairs of the ghat, *Panna*, deceased, the father of *Madan*, Defendant, and *Chatraban*, Defendant, instituted a suit without joining Plaintiffs, and with a view of depriving them of their right in the Munsif's Court at *Mathra* for Rs.1000, on declaration that they alone were the mutawallis (managers), and under a fictitious deed of compromise obtained a collusive decree on the 21st of December, 1882. Through collusion they had it recorded in the deed of compromise that Rs.600 had been laid out in the repairs, and with reference to the balance of Rs.400 a payment by instalments of Rs.80 a year had been agreed, and the application filed by the Plaintiffs in the Munsif's Court at *Mathra*, praying to be joined as a party, was disallowed on the 14th of September, 1883. That was one of their grounds for asking the Court to exercise its discretion in making a declaratory decree. The next ground was: "That a fictitious suit was instituted by *Changaji* and others against *Panna* and others, Defendants, in this Court, and Plaintiffs filed an application in this Court, also praying to be joined as a party under sect. 32 of the Civil Procedure Code; but the said application was

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disallowed on the 3rd of July, 1883, and Plaintiffs were not joined as a party. That all the Defendants to this suit have colluded with one another, and have taken collusive proceedings in the Munsif's Court at *Mathra*, and in this Court, with a view of depriving Plaintiffs of their right. They declare themselves to be the owners, and deny Plaintiffs' right; hence the cause of action arose on the 11th of August, 1882, the date of the institution of the suit in the Munsif's Court at *Mathra*, and on the 14th of February, 1883, the date of the institution of the suit in this Court at *Agra*." They then stated what the relief was which they sought, and they prayed judgment for "a decree for the declaration of the Plaintiffs' right as mutawalli and manager of the *Bisram Ghat*, and all the temples attached to the same, to the extent of one-third, be passed in favour of the Plaintiff as head of the Sannadhias against his brother Sannadhias," and that it might be likewise declared in the said decree that "Defendants alone were not owners and mutawallis of the said ghat." It appears to their Lordships that the Plaintiffs have made no case. They have not proved that they were entitled as mutawallis and managers of the *Bisram Ghat* to one-third of the offerings made by their followers, and they could not be entitled to have a declaration that the Defendants were not the sole owners, unless they could prove a right on their parts to be part owners. Having asked for a declaratory decree, they go on in pursuance of the *Relief Act* to allege that, "The collusive decree obtained by the Defendants from the Munsif's Court at *Mathra* against *Bhagwan Das*, for which Defendants have declared themselves liable under the deed of compromise, having been set aside, its amount be recovered from the Defendants, and it be used in the repairs of the *Bisram Ghat*, either with the consent and management of the parties or through an official of the Court."

There were many witnesses examined, and considerable discrepancies in the evidence given. The first Court laid down certain issues, the fourth issue being, "Are the Plaintiffs guardians of *Bisram Ghat*, vested with a right to receive the offerings made in it, to superintend the repairs and erection of the building there, or are they priests at *Swami Ghat*, plying

their professional duty there?" It might be that they were priests of *Swami Ghat*, and yet might also have an interest in *Bisram Ghat*. The whole point of the issue is—were they guardians of *Bisram Ghat*, with a right to receive the offerings made in it, and to superintend the repairs and erection of buildings there? The Subordinate Judge delivered judgment, in which he said: "The Plaintiffs in this case have no connection with the *Bisram Ghat*; they are Sannadhia Brahmins, having no concern whatever with the property which was used by the Chaubeys as the place of their worship. *Bisram Ghat* is the worshipping place of the Chaubeys, in the vicinity of which the Plaintiffs, who are Sannadhias, have their temples. My inspection of the place has fully convinced me of this. The documentary and oral evidence abundantly establish this conclusion to my entire satisfaction. Both sects, the Sannadhias and the Chaubeys, are bitter enemies to each other, and could not be expected to have a common place for their worship." Having come to that conclusion, he dismissed the Plaintiffs' suit with costs.

It is not necessary for their Lordships in concurring in the judgment of the Subordinate Judge to agree in all his reasons. It is quite consistent with the decree which he passed dismissing the suit that the Plaintiffs may have some right in *Bisram Ghat*; but they have not proved any right to have it declared that they are entitled as mutawallis to have an interest to the extent of one-third of the offerings. The Subordinate Judge dealt with the evidence in the most general terms. He did not allude to any particular witness or any particular document, but he said: "I think the Plaintiffs have not made out their case."

The High Court dealt with the case in the same general terms. The Subordinate Judge had heard the witnesses. He had better opportunities of judging of the evidence, and of the several discrepancies, than the High Court, who did not hear the witnesses or see their demeanour. The High Court did not decide whether the Plaintiffs were the mutawallis, entitled to one-third, but they said: "In support of their case they produced a firman of the Emperor *Furrukh Shah*." It appears to their Lordships that that firman, as it is called, did not vest any right in either party, and is not a document which can be held to support the case

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either of the one side or of the other; but the High Court attached some importance to it. The judgment continues: "The Plaintiffs produced oral evidence of witnesses which go to support their assertions; and it seems to be virtually conceded that if they do belong to the Chaubey sect they are entitled in respect to the ghat to enjoy the privileges and rights of the Chaubey community concerned therein." The learned Judge who delivered the judgment then proceeds: "It seems to me to be established beyond question that they do belong to the Chaubey class, and no evidence is shewn to us on behalf of the Respondents to contradict that produced by the Appellants. This being so, and taking all the circumstances of the case into consideration, I think the Plaintiffs Appellants are entitled to the same decree as that granted to the Plaintiffs Appellants in F. A. No. 172 of 1885, decided this day"—referring to another suit. Their Lordships see nothing on the record to shew that there was any concession by the Defendants of the kind indicated by the High Court. The decree which follows is not confined merely to the order expressed in the judgment. It proceeds: "It is ordered and decreed that this appeal be decreed; that the decree of the Subordinate Judge of *Agra* be set aside, and in lieu thereof it is hereby declared that the Plaintiffs Appellants aforesaid are entitled to have, exercise, and enjoy all rights of care, use, and management of the *Bisram Ghat*, and the buildings appertaining thereto, situated on the bank of the River *Jamna*, in the city of *Mathra*, and in connection with the expenditure of the sum of Rs.1000 bequeathed by the late *Bindraban Das Khettri* for the repairs of the said ghat, so far as the same have not yet been expended, as declared by the deceased *Bindraban Das*."

If their Lordships considered that the judgment of the High Court ought to be affirmed, it would be necessary to state in what manner that decree should be altered; but their Lordships are of opinion that the judgment of the High Court has gone upon a wrong principle, it merely stating that if the Plaintiffs belonged to the Chaubey class they were entitled to all they claimed, and that they did belong to the Chaubey class.

It appears to their Lordships that the learned Judges of the High Court have not sufficiently kept in view the only rea-

question raised in this case, namely, whether the Plaintiffs have proved that they, as mutawallis or managers of the *Bisram Ghat*, are entitled to one-third of the donations given by pilgrims to that ghat, and also that the suits referred to were fictitious. In their Lordships' opinion the Plaintiffs have not made out a case for the declaratory decree which they claimed, and certainly they have not made out a right to have the decree obtained by the Defendants from the Munsif's Court, at *Mathra*, against *Bhagwan Das*, set aside, and to have the amount recovered from the Defendants in that suit used in the repairs of the *Bisram Ghat*.

Their Lordships think, therefore, that the decree of the High Court ought to be reversed, and the decree of the Subordinate Judge affirmed; but holding that the Plaintiffs are not entitled to the right claimed or to the relief sought, their Lordships wish it to be distinctly understood that they do not express any opinion with respect to any other rights, if any, which either of the parties to the suit may have or claim to have in the aforesaid *Bisram Ghat*.

Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the High Court, and to affirm the decree of the Subordinate Judge, and to order the Respondents to pay the costs in the High Court. The Respondents must pay the costs of this appeal.

Solicitors for Appellants: *T. L. Wilson & Co.*

J. C.* MADHO PARSHAD . . . . . DEFENDANT ;

AND

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June 25. MEHRBAN SINGH . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Hindu Law—Mitakshara—Sale by co-Parcener—Rights of Survivor—Liability of Purchaser.

Where a Hindu without the consent of his co-parcener had sold his undivided share in the family estate for his own benefit, and received the purchase-money to his own use :—

Held, that on his death his surviving co-parcener was entitled to the said share under the Mitakshara law by survivorship, and to recover the same from the purchaser, and that the latter had no equity or charge thereon against such survivor in respect of his purchase-money.

APPEAL from a decree of the Judicial Commissioner of *Oudh* (Jan. 26, 1888) affirming a decree of the District Judge of *Lucknow* (Nov. 23, 1886), which reversed a decree of the Subordinate Judge of *Unao* (May 14, 1886).

The facts and proceedings in the suit, which was brought by the infant Respondent by his mother and guardian, are stated in the judgment of their Lordships.

Mayne, for the Appellant, said that the defence to the suit was that, either under the Hindu law or by the special custom of the village, the deeds executed by *Zalim Singh* were valid. But, however that might be, in any case they should only have been set aside on the terms of repaying to the Appellant the amount of the purchase-money which he had paid.

Reference was made to *Sadabart Prasad Sahu* v. *Foolbash Koer* (1) ; *Deendyal Lal* v. *Jugdeep Narain Singh* (2) ; *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (3) ; *Mahabur Pershad* v. *Ramyad Singh* (4).

Present:—LORD WATSON, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

(1) 3 Beng. L. R. (F. B.) 31.
(2) Law Rep. 4 Ind. Ap. 247.
(3) Law Rep. 6 Ind. Ap. 88.
(4) 12 Beng. L. R. 90.

The Respondent did not appear.

The judgment of their Lordships was delivered by

LORD WATSON :—

In this case, which was heard *ex parte*, the Appellant did not impugn the findings of fact upon which the judgments he complains of are based ; and his argument was addressed to a single question of law.

The Respondent, Plaintiff in the suit, and his paternal uncle *Zalim Singh*, were the members of an undivided Hindu family, and, as such, were co-sharers of land in three villages situated in the district of *Unao*, in *Oudh*. *Zalim* died childless in January, 1885. Seven days before his death he and *Mussammat Chitta*, therein described as his wife, executed and delivered three deeds of sale to the Appellant of his undivided share and interest in each of these villages, at prices amounting in all to Rs.10,000, which were duly paid by the Appellant. These sales were made by the deceased for his own personal benefit, without the consent of the Respondent, and without legal necessity.

The suit was brought by the Respondent in January, 1886, for cancellation of these three deeds of sale, with an alternative conclusion for pre-emption in the event of their validity being sustained. The Subordinate Judge held that they were valid, upon the ground, now admitted to be untenable, that by a village custom each co-sharer was entitled to sell or mortgage his undivided interest ; and, on payment by the Respondent to the Appellant of Rs.10,000 within a time limited, he decreed pre-emption and possession, otherwise the suit to stand dismissed. On appeal, the District Judge reversed his decision and decreed cancellation of the sale deeds, holding that the alienation by *Zalim* was void, according to the law of the Mitakshara. The decree of the District Judge was affirmed, for the same reasons, by the Judicial Commissioner.

The Appellant conceded in argument that the rules of the Mitakshara law which prevail in the Courts of *Bengal* are applicable in *Oudh* to the alienation of interests in a joint family estate. He likewise conceded that the sales by *Zalim Singh*, being without the consent of his co-parcener, and not justified

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by legal necessity, were according to that law invalid; but he maintained that, the transactions being real and the prices actually paid, the Respondent could only recover the shares sold, subject to an equitable charge in his favour for the Rs.10,000 which were received by *Zalim*.

The second point ruled by a full bench of the High Court at *Calcutta*, in *Sadabart Prasad Sahu* v. *Foolbash Koer*(1), arose in circumstances somewhat resembling those of the present case. The facts stated were, that a member of a joint family had executed an ordinary mortgage in respect of his undivided share of a portion of the family property, in order to raise money for himself, and not for the benefit of the family; and the point submitted for decision was, whether, after the death of the mortgagor, a surviving member of the joint family could recover possession from the mortgagee without redeeming. Sir *Barnes Peacock*, who delivered the judgment of the Bench, after a full examination of the authorities bearing upon the question, held that, according to Mitakshara law, the mortgagor "had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account and not for the benefit of the family"; but that the facts were not sufficiently stated to enable the Court to say whether the mortgaged interest could be recovered without redemption.

The Appellant referred to three subsequent decisions as illustrating and supplementing the doctrine laid down by the full bench in *Sadabart's* case. In dealing with these authorities, which appear to their Lordships to be perfectly consistent with that doctrine, it is necessary to keep the following considerations in view. Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process. So long as his interest is indefinite, he is not in a position to dispose of it at his own hand, and for his own purposes; but, as soon as partition is made, he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property. Actual partition is not in all

(1) 3 Beng. L. R. 31.

cases essential. An agreement by the members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of a member's interest in the estate, or a sale under the execution.

Two of the cases referred to were decided by this Board. In *Deendyal Lal* v. *Jugdeep Narain Singh* (1), a judgment debtor of the father of a joint Hindu family under an attachment of his title and share exposed the whole family property to judicial sale, at which it was knocked down to a purchaser who obtained possession and the usual certificate of title. The son of the judgment debtor then brought a suit for recovery of the estate thus sold against the purchaser, joining his father as a Defendant. Their Lordships, distinguishing between the cases of purchase by private bargain and at an execution sale, held that the son was not entitled to recover that portion of the estate which represented the undivided share of the father, and declared that the purchaser had the right to take such proceedings as he might be advised for having the judgment debtor's share and interest ascertained by actual partition. In *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (2), the circumstances in so far as these related to the interest of the judgment debtor were the same, with this important exception, that the latter died before the sale of his undivided share took place. It was pleaded for his minor sons that, at the time of the sale, the interest of the deceased had passed to them by survivorship; but their Lordships affirmed the right of the purchaser on the ground that, before their father's death, the execution proceedings had gone so far as to constitute, in favour of the judgment creditor, a valid charge upon the joint estate, to the extent of the undivided interest of the deceased, which could not be defeated by that event. At the same time, their Lordships held it to be clear upon the authorities that, if no proceedings had been taken to enforce the debt in their father's lifetime, "his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands."

(1) Law Rep. 4 Ind. Ap. 247. (2) Law Rep. 6 Ind. Ap. 88,

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These two decisions lend no assistance to the argument of the Appellant. He has not taken, and cannot now take, any proceedings against *Zalim Singh*, whose undivided interest, according to the law expressly laid down in the second of these decisions, passed on his death to the Respondent, free from any claim at the instance of personal creditors of *Zalim*.

The Appellant hardly disputed that the interest of *Zalim* passed by survivorship to the Respondent; but he relied on the case of *Mahabur Pershad* v. *Ramyad Singh* (1), decided by the High Court of *Calcutta* in 1873, as an authority for the proposition that the prices paid by him ought to form an equitable charge upon that interest, in a question with the Respondent. In that case, the father of a Hindu family, with the knowledge and acquiescence of his elder son, mortgaged the joint property without legal necessity and without consent of a minor son, who was the other co-parcener. The mortgagees obtained a decree on their bond, in execution of which they, notwithstanding the objections of the minor co-parcener and his brother, caused the property to be sold, and themselves became the purchasers. In a suit against them, at the instance of the two sons, the Court, in the interest of the minor, set aside the alienation, but directed that, on recovery of the property, it should be held and enjoyed in defined shares, and that the shares of the father and his elder son should be jointly and severally subject to the lien thereon of the mortgagees for the sum advanced by them with interest until repayment. The reasons assigned by *Phear* and *Ainslie*, JJ., for ordering partition, and making the loan an equitable charge upon the shares other than that of the minor, were shortly these, that a decree, without such qualification, would have had the effect of restoring their property to the father and son, and leaving them at the same time in possession of the money which they had borrowed on its security—a result which the learned Judges justly considered would be contrary to equity and good conscience.

Their Lordships are unable to see that any analogy exists between that case and the present. It is unnecessary to decide whether, if *Zalim Singh* had been still alive, and so entitled to

(1) 12 Beng. L. R. 90.

resume his undivided share on cancellation of the sale deeds, it would have been possible to order partition and to charge *Zalim's* divided share with the Rs.10,000 paid to him by the Appellant. That course is rendered impossible by his death. It might have been quite consistent with equitable principles to refuse to *Zalim* restitution of the interest which he sold, except on condition of its being made at once available for repayment of the price which he received. But the Respondent is not affected by any equity of that kind. He took in his own right by survivorship, and is not liable for the personal debts and obligations of his uncle *Zalim*; and it appears to their Lordships, that an equity which might have been enforced against *Zalim's* interest whilst it existed cannot be made to affect that interest when it has passed to a surviving co-parcener, except by repealing the rule of the Mitakshara law.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed.

Solicitors for Appellant : *Young, Jackson & Beard.*

In re QUARRY.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Certificated Pleaders—Act XVIII of 1879, *s.* 13—*Suspension—Quantum of Punishment.*

Where a certificated pleader has been suspended by the Court for twelve months for " reasonable cause " within the meaning of sect. 13 of Act XVIII of 1879 :—

Held, that such decision will not be interfered with unless it is clearly shewn that the *quantum* of punishment was unreasonable and excessive.

THIS was a petition by the above-named *Quarry*, praying that his appeal from an order of the High Court (Dec. 3, 1889), suspending him from practice for a term of twelve months, be taken into consideration at an early date.

Branson, for the Petitioner.

**Present*:—LORD WATSON, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

J. C. July 5. The judgment of their Lordships was delivered by

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In re QUARRY.

LORD WATSON :—

The Appellant, Mr. *F. W. Quarry*, was heard last Saturday on an application to stay the execution of an order of the High Court of the North-Western Provinces pending an appeal at his instance, and their Lordships on that occasion directed the petition to stand over, and allowed the Appellant to be heard to-day on the merits of his appeal.

The letters produced appear to their Lordships to afford ample evidence, under the hand of the Appellant, that, in his professional capacity, he was guilty of grave improprieties which the Court could not overlook when the matter was regularly brought under its notice. Such conduct, in the opinion of their Lordships, amounts to "reasonable cause" for suspending a certificated pleader within the meaning of sect. 13 of the Act XVIII of 1879.

That being so, the only question which remains for consideration is, whether the learned Judges of the High Court have erred in visiting the offence with twelve months' suspension from office. It must be borne in mind that the Court which awarded that penalty were in a much better position than this Board to estimate the degree of punishment which, in the whole circumstances of the case, and in the interests of the profession and of the public, ought to follow such misconduct on the part of one of its pleaders. Their Lordships cannot, in a case like the present, interfere with the decision of the Court below unless it is clearly shewn that the *quantum* of punishment was unreasonable and excessive. Notwithstanding the able and temperate argument of Mr. *Branson*, they are unable to come to that conclusion, and they will accordingly humbly advise Her Majesty that the appeal ought to be dismissed.

Solicitors for the Petitioner : *W. Carpenter & Sons.*

UMES CHUNDER SIRCAR . . . . . PLAINTIFF;

AND

MUSSUMMAT ZAHOOR FATIMA AND OTHERS . . . . . DEFENDANTS.

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Nov. 20, 21.
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July 19.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mahomedan Law—Construction of Deed of Settlement—Vested Remainders—Civil Code Procedure, s. 266—Liability to Attachment—Lis Pendens—Rights of Puisne Mortgagees and their Assignees.

Where by a Mahomedan deed of settlement a husband granted the lands in suit to his wife on condition that if she has a child by him the grant should be taken as a perpetual mokurruri, and in case of no child being born as a life mokurruri with remainder to the settlor's two sons :—

Held, that the two sons took definite interests under the deed similar to vested remainders though liable to be displaced, and that such interests were liable to attachment, not being mere expectancies within the meaning of Civil Procedure Code, s. 266.

Semble, a sale which purports to carry all the interest of the judgment debtor includes any enlargement of that interest subsequent to attachment, as in this case by the intervening death of the settlor, no child having been born.

A decree for sale of mortgaged property having been obtained by a first mortgagee in a suit against the mortgagors only, the assignee of the mortgage bought the same. It appeared that the Appellant had succeeded to four out of five subsequent mortgages executed prior to suit, and also to a number of subsequent mortgages executed pending or after the suit :—

Held, that the District Judge was wrong in not distinguishing between the mortgages in respect of their being executed before or after suit. As regards the former, the Appellant not having been a party to the decrec for sale, was entitled to redeem the purchaser ; as regards the latter, he was bound by the decree for sale, and his interest passed to the purchaser.

Held, further, that although in the decree for sale the rate of interest was cut down, as regards the decree-holder and after decree, from the stipulated to the Court rate, that provision enured only to the benefit of the judgment debtor as a party to the suit. The Appellant seeking to redeem the first mortgagee must pay the rate of interest as stipulated in the mortgage, there being no jurisdiction either under sect. 10 of Act XXIII of 1861, or Civil Code Procedure, s. 209, to cut it down.

APPEAL from a decree of the High Court (Sept. 10, 1885), varying a decree of the District Judge of *Gya* (Sept. 17, 1883),

* *Present* :—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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so far as it related to the Respondent *Zahoor Fatima*, and affirming the rest.

The question in the appeal related to the right of the Appellant to redeem (or sell in the alternative) as a puisne mortgagee a portion of *Mouzah Sirdilla*.

The Appellant's suit was to establish his right as a purchaser of part, and a mortgagee of the residue, of an estate called *Sirdilla*, which had passed into the hands of a number of persons, including the Respondent, by means of mortgages and purchases at sales in execution of decrees, to redeem prior encumbrances, or to have a sale directed of certain proportions of the mortgaged estate, and the proceeds applied in such a manner as the priorities of the encumbrancers and the equities of the case required.

The portion of mouzah *Sirdilla* with which the suit was concerned was one of 11 annas, 15 dams, and 11 cowries (called in the suit a 12-annas share), which, by a formal partition, made in October, 1867, had fallen to one *Sultan Ali* and his two sons, *Farzund Ali* and *Farhut Ali*, and his daughter-in-law, *Mussummat Hosseini*, the wife of *Farhut Ali*, which three parties were Defendants in the Court below.

The shares in which they at first took that aggregate portion were—

	A.	D.	C.
Sultan Ali . . .	5	13	6 and a fraction.
Farzund Ali . . .	2	0	0
Farhut Ali . . .	2	0	0
Mussummat Hosseini . .	2	2	4 and a fraction.

On the 26th of January, 1871, *Sultan Ali* made a gift in the form of a sale for consideration of 4 annas of his share to his two sons, and the residue, called in the deed of sale 1 anna and 14 dams, he granted in mokurruri at a rent of 1 rupee to his second wife, *Amani Begum*, with the condition that, if she should die childless, that share should fall to his two sons; but that, if she should have a child living at her death, such child should take it.

As a matter of fact, she had no child, and hence the first Court held that the lease was one for her life.

Shortly afterwards a series of mortgages, some by the two

sons and *Hosseini* jointly, and some by the sons jointly or singly, commenced and extended over a period of about eight years, and down to near the death of *Sultan Ali* on the 29th of April, 1879.

The first of these was a mortgage of a "4 annas of the entire 16 annas" of *Sirdilla*, and of a room in a certain house standing on another property, called *Sahebgunje*, to one *Mahomed Hossein Khan*, on the 14th April, 1871, to secure Rs.8000, and interest thereon.

Then there followed a mortgage of the 29th July, 1873 (B 2), to one *Arshad Ali*, under which the Respondent claimed.

By that instrument the same three persons mortgaged to *Arshad Ali* "2 annas out of the entire 16 annas of *Sirdilla*," with a room in a house in *Sahebgunje*, to secure Rs.2000, with interest payable in January, 1875.

Then there followed a number of other mortgages to *Arshad Ali*, and to another mortgagee by name *Sheo Churn Lal*, the interests in all of which came by assignment afterwards to the Appellant.

Arshad Ali having died, his widow, *Akhtar Fatima* (whose heiress the Respondent, her sister, afterwards became), sued *Farzund Ali*, *Farhut Ali*, and *Hosseini*, on the mortgage on the 29th of July, 1873, to which *Akhtar Fatima* had become solely entitled on her husband's death, and obtained an *ex parte* decree on the 23rd of June, 1875, for the amount of the debt, with a direction that the mortgaged property should be sold in satisfaction.

After the date of that decree, a series of mortgages were executed to the Appellant, of which some were executed by the brothers, either jointly or singly, by which they mortgaged for various advances portions of their interest in *Sirdilla*, and of the house in *Sahebgunje*.

On the 15th of September, 1876, the two brothers, together with *Hosseini*, mortgaged "the entire 16 annas" of *Sirdilla* to the Appellant to secure the repayment in September, 1878, of Rs.4000 with interest.

On the 16th of March, 1877, the 14th of August, 1877, the 26th of September, 1877, and the 20th of September, 1878, similar

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mortgages, to secure various sums, were executed to the Appellant by the two brothers and *Hosseini* of the "entire 16 annas" of *Sirdilla*.

In addition to the mortgages so executed directly to the Appellant, he acquired, by purchase, the interest of *Sheo Churn Lal* in the mortgages executed to him, and of *Arshad Ali* in B 2. As to his rights under those purchases, except so far as regards certain interests acquired by the Respondent in 17 dams, no question was raised in the appeal.

The questions in the appeal between the Appellant and Respondent, as to which the Courts below differed, were two, and they arose in manner following :—

As before mentioned, on the 29th of July, 1873, the two brothers and *Hosseini* mortgaged 2 annas of the entire 16 annas of *Sirdilla*, together with one room of a house in *Sahebgunje*, to *Arshad Ali*, the interest in which passed on *Arshad Ali's* death to his widow, *Akhtar Fatima*, who obtained a decree on the 23rd of June, 1875, against the mortgagors for sale of the mortgaged share, the interest in which decree, on the death of *Akhtar Fatima*, passed to the Respondent as her heiress.

The Respondent took out execution of this decree, and had sold by the Court on the 15th of December, 1879, what was described in the execution proceedings as "2 annas out of 16 annas of *Kusba Jurra* (*i.e.*, *Sirdilla*) belonging to the debtors." The principal question, as to which the Courts below differed, was whether the Plaintiff was a puisne incumbrancer or mortgagee of those 2 annas, and of the room mortgaged therewith, and as such entitled to redeem them or have them sold in the suit to pay off the respective mortgages according to their priorities.

The First Court held that the Plaintiff, as assignee of the mortgage of the 17th of March, 1874 (B 3), of the 11th of May, 1875 (B 7), of the 4th of June, 1875 (B 8), by which each brother mortgaged his entire share, the two mortgages of the 15th of May (B 15 and 16), by which the whole house (as well as shares of *Sirdilla*) were mortgaged to *Sheo Churn Lal*, and also the mortgages of the 15th of September and subsequent dates, by which the two brothers and *Hosseini* had mortgaged to the

Plaintiff the entire family share of *Sirdilla*, was a puisne mortgagee of the 2 annas purchased by the Respondent. The mortgage of the house in *Sahebgunje* was held to be a valid one, and to confer "the legal consequences resulting therefrom."

The High Court held that the Plaintiff had not satisfactorily shewn that those 2 annas had been included in the earlier mortgages of which the Plaintiff had become assignee, and took no notice at all of their inclusion in the subsequent mortgages to the Plaintiff of the entire family share, and accordingly dismissed the Plaintiff's suit wholly as to those 2 annas.

The other question related to 17¹ dams, being the half of the share granted in mokurruri by *Sultan Ali* to his wife *Amani*, and arose thus :—

The Respondent having obtained a decree against *Farzund Ali* alone on a mortgage (B 27), which had been executed to her by *Farzund Ali* alone on the 18th of July, 1878 (*i.e.*, in the lifetime of *Sultan Ali*), of a 1-anna share of *Sirdilla*, caused the attachment and sale not only of that 1 anna, but also of 17 dams, the moiety of the proprietary interest retained by *Sultan Ali*, and which had descended on his death to *Farzund Ali*, and of the entire house at *Sahebgunje*.

At that sale on the 15th of May, 1880, the Respondent became the purchaser for the sum of Rs.10 of the interest of the judgment debtor in those 17 dams, and obtained her certificate on the 10th of January, 1881.

The Appellant, on the other hand, derived title from one *Iswardyal*, who had obtained a mortgage (B 26) on the 27th of March, 1878, from *Farzund Ali* of "1 anna out of 16 annas" of *Sirdilla*, to secure repayment of Rs.500 with interest. On the 14th of April, 1879 (*i.e.*, a few days before *Sultan Ali* died), *Iswardyal* applied for execution of this decree against the 1 anna mortgaged and the other 7 annas, the interest of the debtor which was not mortgaged, *i.e.*, in all an entire moiety of the family share of *Sirdilla*, which *Iswardyal* by his application alleged to belong to *Farzund Ali*.

The sale took place on the 17th of July, 1879 (which was after *Sultan Ali's* death), and *Iswardyal* became the purchaser of the whole interest so attached and sold, including the 17 dams in

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dispute. He obtained his certificate on the 22nd of September, 1879.

The interest so acquired *Iswardyal* sold subsequently to the Appellant, who claimed priority to the Respondent by reason of his title being derived from a prior attachment and sale.

The Judge held that the Appellant had such priority.

The High Court held that the Appellant had a valid mortgage of the father's share, which he was "entitled to follow into the hands of the mortgagors," but that the Respondent, as a *bona fide* purchaser for valuable consideration without notice of the Appellant's mortgage, had priority over the Appellant. It accordingly dismissed the latter's suit wholly as to those 17 dams.

Doyne, for the Appellant, contended that the sale of the house at *Sahebgunje* should have been directed by the First Court. As regards the 17 dams the First Court was right in holding that the Appellant was entitled as purchaser in respect of them prior in point of time to the Respondent. He took by his purchase *Farzund's* right, title, and interest. Under the deed of the 26th of January, 1871, that interest was definite; and on the death of *Sultan Ali*, without a child, was vested in the judgment debtor beyond the possibility of displacement. Before *Sultan Ali's* death it was seizable under sect. 266 of Civil Code Procedure, 1877. The sale was after *Sultan Ali's* death, and passed the whole interest which then vested in *Farzund*. Even if the Appellant were not entitled as a prior purchaser his suit should not on that account have been dismissed. He was at least entitled to treat the Respondent as a mortgagee, and to be allowed to redeem the 17 dams in question or to have them sold subject as to the proceeds of sale to the respective priorities as ascertained by the final judgment in the suit. Then as regards the 2-annas share the First Court was right in holding that the Appellant was a mortgagee both directly and by assignment and of the room mortgaged therewith; and as a puisne mortgagee he was entitled to redeem a prior mortgage. The Court was wrong in decreeing a sale under the circumstances, and then leaving the parties to settle priorities against the purchase-money. The Appellant ought to have been allowed to redeem.

Mayne, and *C. W. Arathoon*, for the Respondent *Zahoor Fatima* contended that the District Judge was wrong in throwing on the Respondent the burden of proving that the 17-dams share was not attached and sold in execution of *Iswardyal's* decree. The District Judge ought to have held that the 17 dams in question were neither attached nor sold to the Appellant. The Respondent's purchase was proved, and was made without notice of any claim by the Appellant. The Appellant's claim to the 17 dams was an afterthought, never made till 1882 after the sale to the Respondent. The 17 dams were not supposed to be included in what was attached, for the judgment debtor had at the time of the attachment only an indefinite interest or expectancy therein which was not liable to attachment. The death of *Sultan Ali* between the attachment and sale would not affect the 17 dams. The sale was only of what was attached, and would not pass any extension of interest which accrued after attachment. As to the claims to redeem set up by the Appellant in this suit the analogy between mortgagor and mortgagee in English and in Indian law must not be pressed too far. In *England* mortgage rights are worked out by redemption and foreclosure. A purchaser at a sale by a mortgagee under his power, or at an execution sale, takes the interest of the mortgagor as well as of the mortgagee. He purchases the interest of the mortgagee as it stood at the time of the pledge, and not merely what it might be at the time of the sale. In other words, the sale in 1879 had the effect of shutting out all puisne mortgagees. In Indian law special provisions govern the case. See *Brajaraj Kisori Dasi* v. *Mohammed Salem* (1); *Syed Lutf Ali Khan* v. *Futteh Bahadoor* (2). Under certain circumstances a purchaser buys merely an interest which gives him a right to redeem, but never to redeem those charges in respect of which the sale was made. Reference was made to *Rajnarain Singh* v. *Sheera Mean* (3); *Syud Emam Momtazood-deen Mahomed* v. *Rajcoomar Doss* (4); *Gopeenath Singh* v. *Sheo Sahoy Singh* (5); *Bulwant Singh* v. *Gokaran Prasad* (6). Subsequent incumbrances do not diminish the estate taken by the first

(1) 1 Beng. L. R. A. C. J. 152.
(2) L. R. 16 Ind. Ap. pp. 129, 136.
(3) 7 Suth. W. R. 67.
(4) 14 Beng. L. R. (F. B.) 408. 410.
(5) 1 Suth. W. R. 315.
(6) Ind. L. R. 1 Allah. 432.

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mortgagee. The later incumbrancers have a right to have the estate sold and the proceeds appropriated to the discharge of the incumbrances according to their priorities.

Doyne, replied.

1890. July 19. The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

Their Lordships are of opinion that the house in *Sahebgunje* should be included in the direction to sell, and they will now express their opinion as to the question of the 17 dams of property as to which the Plaintiff and the Defendant *Zahoor* each claims to be the absolute owner. The question is, who acquired the ownership first in point of time? The Plaintiff's claim depends on his purchase of the 17th July, completed on the 22nd of September, 1879. If that is a valid purchase, it is prior to the purchase of the Defendant, which did not take place till the year 1881; and the Plaintiff is entitled to that share of the property.

The purchase took place under these circumstances. On the 14th of April, 1879, one *Iswardyal*, who for this purpose is identical with the Plaintiff, having got a decree on a mortgage, applied to enforce it "by attachment and sale of the immoveable properties owned by the judgment debtor" (the judgment debtor being *Farzund Ali*, the mortgagor), "as specified in the inventory mentioned below." The inventory mentioned below specifies 1 anna out of 16 annas of mouzah *Sirdilla*, the property mortgaged in the bond; and also 7 annas out of 16 annas of *Sirdilla*, owned by the judgment debtor, which was property not mortgaged in the bond. That application includes 8 annas of the family property. Eight annas was a larger share than *Farzund Ali* was actually entitled to, because he and his brother held equal shares in the property, and their sister-in-law *Hosseini* had a share also; but the circumstance that the description of the property includes more than the judgment debtor was actually entitled to would not tend to exclude the 17 dams in question from that description.

The sale took place, and the certificate was granted on the 22nd

of September, 1879, and it is there certified that the decree-holder has been declared as the purchaser of the judgment debtor's right in 1 anna out of 16 annas which were mortgaged, and so forth, and by another certificate there is a similar declaration as to the 7 annas. So that it is quite clear that the intention was to attach and to sell whatever right and interest the judgment debtor *Farzund* had in the 8 annas of the property. The question is, what interest had he as regards these 17 dams? That depends upon the construction of the deed of the 26th of January, 1871. In that deed there may be some obscurity as to the exact interest that the children of *Sultan Ali* and his wife *Amani Begum* were to take, but as applied to the events that have happened there is no obscurity about it. *Sultan Ali*, the then owner of 1 anna and 14 dams, grants that share in mokurruri farm to his wife *Amani Begum* on this condition, that if she has a child by him the grant shall be taken as a perpetual mokurruri. Whether descendible to children or taken by children in remainder does not matter now (the deed is rather obscure on that point), but it is to go to the child of *Sultan Ali* and *Amani Begum* in perpetual inheritance. In case of no child being born, then it is only to be a life mokurruri, and after the death of *Amani Begum* the property is to come to the possession of the settlor's two sons, *Farzund* and *Farhut*. There is to be paid the Government revenue on the share of the estate, and one rupee to the settlor. At the time of the attachment *Sultan Ali* was still living, and, at all events, in contemplation of law there might be a child to take; but the deed confers upon the sons *Farzund* and *Farhut* a definite interest, like what we should call in English law a vested remainder; only that it was liable to be displaced by the event of there being a son of *Sultan Ali* by *Amani Begum*. Between the attachment and the sale—very soon after the attachment—*Sultan Ali* died, and then the contingency, such as it was, was entirely put an end to. It is quite true the parties might not know whether *Amani Begum* was with child by *Sultan Ali* or not, but the fact was determined at that time, and there was no longer any contingency in the eye of the law. It does not, in their Lordships' view, very much signify whether *Sultan Ali* was alive or dead at the time of the sale, but

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they wish to guard themselves against being supposed to concur in an argument that was presented at the Bar, to the effect that if between the time of attachment and the time of sale events should happen which would have the effect of accelerating or enlarging the interest of the judgment debtor as it stood at the time of attachment, that augmented interest would not pass by the sale which purports to convey all that the judgment debtor has at the time. But taking the case most strongly against the Plaintiff, supposing that he could get nothing but that which was capable of attachment, and was actually attached on the 14th of April, 1879, their Lordships hold that this interest in remainder is a property which was capable of being attached, and which was intended to be attached. It is said that by sect. 266 this property was not liable to attachment, because it is there provided that, "The following particulars shall not be liable in attachment"; and among them is, "an expectancy in succession, by survivorship or other merely contingent or possible right or interest." It seems to their Lordships that in all probability the High Court, who held that the 17 dams were not attached, must have had this section in their view, though they do not refer to it, because they treat the case as if the two sons had no interest during the life of their father, but as if, upon the father's death, they inherited the property from him. But that is not the case, excepting as regards the one rupee, which for this purpose may be thrown out of consideration altogether. Except as regards that one rupee they inherited nothing from him. He had in his lifetime parted with the whole property, either to *Amani Begum*, his wife, and her children by him, or to his two sons. That interest given to the two sons appears to their Lordships not to fall within the description of an expectancy or of a merely contingent or possible right or interest. Their Lordships therefore hold that as regards the 17 dams the Plaintiff has the priority, and that the decree of the High Court is erroneous to that extent.

The next question, on which also the Courts below have differed, is whether the Plaintiff has a right to treat the Defendant *Zahoor* as being only a mortgagee of the share of the property which was purchased by her in execution, and on that

footing to redeem her mortgage. The District Judge thought that the Plaintiff had that right, and gave him a decree accordingly. The High Court thought otherwise, and varied the decree by dismissing the Plaintiff's suit so far as regards the two annas in question.

By the mortgage bond, marked B 2, dated the 29th of July, 1873, *Farzund Ali*, who owned four annas of *Sirdilla*, *Farhut* his brother, who owned 4 annas, and *Hosseini*, their cousin, who owned about 2 annas, 4 dams, mortgaged 2 annas of the whole mouzah to *Arshad Ali*, the predecessor in title of *Zahoor*, to secure Rs.2000 with interest at 24 per cent.

On the 26th of May, 1875, the then owner of the mortgage brought a suit against the three mortgagors, and obtained a decree on the 23rd of June, 1875. The decree was for "the amount of the suit," with costs and interest for the period of pendency of the suit, and for future interest at the rate of Rs. 6 per cent. per annum, and for sale of the mortgaged property.

The decree was not executed till the 15th of December, 1879, when the property described as two annas of *Kusba Jurra* was put up for sale to realize Rs.3582 5*a*. 1*p*., the decretal amount, and was purchased by *Zahoor*, who then owned the mortgage for Rs.4700.

Between the date of *Zahoor's* mortgage and the suit brought to realize it, five other mortgages were executed, two by the three mortgagors, two by *Farzund* and *Farhut*, and one by *Farhut* alone, each mortgaging undivided shares (not further identified) in *Sirdilla*; and four of these mortgages became vested in the Plaintiff. Afterwards a number of other mortgage deeds were executed, some by one of the owners of *Sirdilla*, some by another, making altogether about thirty mortgages of undivided shares, most of which became vested in the Plaintiff.

In deciding that the Plaintiff had become mortgagee of the property comprised in *Zahoor's* mortgage, and was therefore entitled to redeem her, the District Judge allowed no distinction between the mortgages prior to the suit of the 26th of May, 1875, and those subsequent to it, or those subsequent to the decree of the 23rd of June, 1875. He appears to think that because at any time before actual sale the mortgagor himself and anybody

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to whom he may have transferred the property can come in and redeem the property by paying the debt, therefore it follows that after sale the mortgagor's transferee, if not a party to the proceedings, can do the same thing. But if the transfer took place *pendente lite*, the transferee must take his interest subject to the incidents of the suit; and one of those is that a purchaser under the decree will get a good title against all persons whom the suit binds.

Their Lordships think that the High Court were right to confine their attention to the mortgages made prior to *Zahoor's* suit, for the purpose of deciding whether the Plaintiff is entitled to redeem *Zahoor*. But the High Court thought that it was necessary for the Plaintiff to shew that the whole of the two annas comprised in *Zahoor's* mortgage passed under the subsequent mortgages to the Plaintiff, and calculations of great nicety have been entered into for the purpose of shewing that the whole did not pass. Their Lordships do not follow the calculations because they are founded on an erroneous view. After effecting the joint mortgage each of the three mortgagors had a right to redeem the mortgagee, and each could transfer his interest, and with it that right. And it is sufficient to say that by mortgage B 7, dated the 11th of May, 1875, *Farhut* transferred to the Plaintiff's predecessor in title a share in the property which he had not got without taking in his share comprised in *Zahoor's* mortgage. Probably by earlier mortgages, certainly by that mortgage, the right to redeem *Zahoor* in a properly constituted suit was acquired; and it has never been lost, because the Plaintiff was no party to *Zahoor's* suit.

It was indeed argued by Mr. *Mayne* that the sale in 1879 had the effect of shutting out all puisne incumbrances. But their Lordships consider that the right view on this point has been taken in both the Courts below. Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor, to which they are never made parties.

Mr. *Doyne* then contends that the decree is wrong in directing a sale of the whole property, and leaving the rights of the parties to be worked out against the purchase-money, and he claims to

treat the suit as a redemption suit. To this it is sufficient to answer, that the plaint asks for a sale, and that the Plaintiff has not till the hearing of this appeal suggested that the Court should deal with the property in any other way. The decree is right in ordering a sale, and the respective rights of the Plaintiff and *Zahoor* in the purchase-money must be adjusted on the footing that the Plaintiff has the right to redeem *Zahoor's* 2 annas.

Next comes the question on what terms the redemption is to be made. The District Judge has laid down certain rules to guide the course of the accounts. One of them (No. 3) is that a possession of a mortgage shall be taken as equivalent to interest. This rule, which appears to be just and convenient, and is not objected to by either party, will relieve *Zahoor* from giving an account of her receipts, and will deprive her of interest, from some time in the year 1880, when it appears that she took possession. Under rules 1 and 2 she will be entitled to a lien on the property mortgaged to her for the amount of the mortgaged debt for which the property was sold, without regard to the amount paid by her on the purchase. But nothing is said as to the amount of interest to which she is entitled prior to her possession, probably on the ground that possession was given to her immediately after the sale. And the question has been discussed at the Bar to what rate of interest she is entitled. Their Lordships suppose that up to the date of the decree of the 23rd of June, 1875, interest was computed according to the rate allowed by the mortgage deed, viz., 24 per cent. After that date the decree gives interest at 6 per cent.

The Court's power to regulate interest is given by sect. 10 of Act XXIII of 1861, which answers to the 209th section of the present Civil Procedure Code. That power is given when a plaintiff sues for money due to him, and it is a discretionary power to give such rate as the Court may think proper by decree. The decree can only operate between the parties to the suit, and those who claim under them. The plaintiff getting the security of a decree has his interest reduced in the generality of cases. But the Plaintiff in this case comes to take away from *Zahoor* the benefit of the decree. It would be unjust if he could use the

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decree to cut down her interest, while he deprives her of the whole advantage of it. His case is, that as to him *Zahoor* is still but a mortgagee, and if so she should be allowed such benefit as her mortgage gives her. If *Zahoor* had not got a decree, and the Plaintiff had come to redeem her mortgage, he must have paid whatever interest her contract entitled her to, and the Court would have had no jurisdiction to cut it down; and that is the position in which the parties are placed by the decree in this suit. There is a penal rate of interest (120 per cent.) imposed by the mortgage; but it is clear that in 1875 that was not claimed. Nor do their Lordships conceive that it can now be claimed. Setting that aside, the justice of the case demands that *Zahoor* should be able to claim such interest as her contract gives her, up to the time when she took possession of the mortgaged property.

Supposing the redemption effected by the Plaintiff, what is *Zahoor's* position? She was mortgagee of the 2 annas of the old mouzah *Sirdilla* or *Jurra*, the touzi number of which was 1013, and the sudder jumma Rs.797. She then purchased the ownership, subject to the Plaintiff's mortgage or mortgages, of 2 annas of *Kusba Jurra*, which bears another touzi number and a smaller sudder jumma, and which was formed out of 12 annas of the former mouzah *Sirdilla* or *Jurra*, belonging to the family of the mortgagors. She has, therefore, a right to redeem the Plaintiff as regards these 2 annas, on paying such sum as he can properly claim against them in respect of the four mortgages effected prior to the 26th of May, 1875. What that sum may be it is impossible to tell on the present materials, but it can and should be ascertained by inquiry, and a reasonable time should be allowed to *Zahoor* to elect whether or no she will redeem.

Their Lordships will humbly advise Her Majesty to discharge the order of the High Court passed on the 10th September, 1885, and instead thereof to order as follows:—

Declare, that the Plaintiff is entitled to redeem the mortgage of the 29th of July, 1873, upon payment to *Zahoor* of the principal and interest moneys secured thereby, reckoning interest at the rate of 24 per cent. per annum up to the day on which possession of the mortgaged property was awarded in execution to *Zahoor*, and no later.

Declare, that if the Plaintiff exercises such right of redemption, then on payment by *Zahoor* to him of all moneys paid by him for redemption of the mortgage of the 29th of July, 1873 and of such costs of this suit, including the costs of the appeal to the High Court, and of this appeal, as are properly chargeable on the property comprised therein, and of all other moneys, if any, which are due to him on the security of the property comprised in the mortgage of the 29th of July, 1873, in respect of the other mortgages which were effected prior to the 26th of May, 1875, and which afterwards became vested in him, *Zahoor* is entitled to redeem the share of *Kusba Jurra* which was purchased by her under the decree of the 23rd of June, 1875, and possession of which was awarded in execution to her by the Court in the same suit.

Let the Court make such inquiries and take such accounts as are proper for carrying the above declarations into effect, and fix reasonable periods of time within which the Plaintiff and *Zahoor* respectively shall exercise the rights of redemption hereby declared to belong to them.

Declare, that if the Plaintiff and *Zahoor* respectively do not exercise their rights of redemption within such time as the Court by its final order in that behalf may direct, they shall respectively be foreclosed and debarred from all right of redemption.

In all other respects let the decree of the 17th of September, 1883, stand affirmed.

Order *Zahoor* to pay to the Plaintiff the costs of the appeal to the High Court. *Zahoor* must pay the costs of this appeal.

Solicitors for the Appellant : *Wrentmore & Swinhoe.*

Solicitors for the Respondent, *Zahoor Fatima* : *T. L. Wilson & Co.*

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